

No. 15052

United States  
Court of Appeals  
for the Ninth Circuit

*See vol. 2965*

EMPIRE PRINTING COMPANY, a Corporation,  
Appellant,

vs.

HENRY RODEN, ERNEST GRUENING and  
FRANK A. METCALF,  
Appellees.

Transcript of Record  
In Two Volumes

Volume I  
(Pages 1 to 354)

Appeal from the District Court  
for the District of Alaska,  
First Division

FILE

JUN -7 1956

PAUL P. O'BRIEN, C



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska  
First Judicial Division

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corpora-  
tion,

Defendant.

AMENDED COMPLAINT

Comes Now the plaintiff and files this amended complaint herein, herein, and for a claim against the defendant, alleges:

1. That plaintiff has heretofore been, and is now a citizen of Juneau, Alaska, and the duly elected, qualified and acting Treasurer of the Territory of Alaska, and a person of good reputation among his neighbors and fellow citizens.

2. That under existing law the Treasurer of said Territory is ex officio a member of what is commonly known as the "Territorial Board of Road Commissioners" for said Territory, and said Board is composed of the Governor, the Highway Engineer and the Treasurer of said Territory; that Frank A. Metcalf is the duly elected, qualified and acting Highway Engineer of said Territory; that Ernest

Gruening is the duly appointed, qualified and acting Governor, and said two last named persons, together with this plaintiff, at all times herein mentioned, composed said Board of Road Commissioners and as such performed all duties assigned to it by the laws of said Territory.

3. That the defendant above named is a domestic corporation, engaged in the printing and publishing business and said corporation is the publisher and proprietor of that certain newspaper known as "The Daily Alaska Empire," printed and published at Juneau, Alaska, and of daily circulation in said town of Juneau and elsewhere in said Territory and other places.

4. That before the commission of the acts by defendant hereinafter complained of, the said Frank A. Metcalf, the said Ernest Gruening and this plaintiff, acting as the duly constituted Board of Territorial Road Commissioners, and pursuant to law, purchased and acquired for and on behalf of the Territory, the motor vessel "Chilkoot," and caused the same to be operated upon and in the waters of Southeastern Alaska for the transportation of passengers and the carrying of freight; that in order to operate said vessel as aforesaid it became and was necessary to employ seafaring men, purchase supplies and keep said vessel in seaworthy condition; that the cost and expenses thus incurred were paid, in part, by said Board out of revenues earned by said vessel.

5. That before the commission of the acts by defendant hereinafter complained of, one Oscar G. Olson had been the duly elected, qualified and acting Treasurer of the Territory of Alaska; that said Olson, upon indictment duly found by the Grand Jury for the Territory of Alaska, First Judicial Division, charging him, the said Olson with embezzlement of funds and money belonging to the Territory of Alaska, and coming into his possession as Treasurer of said Territory, entered his plea of guilty to such charges and upon such plea was duly sentenced by the United States District Court for the Territory of Alsaka, First Judicial Division, and to serve such sentence in the penitentiary on McNeil's Island, in the State of Washington, and said Olson, at all times herein mentioned was and now is confined in said penal institution.

6. That on the 25th day of September, 1952, the above named defendant, did then and there in the said newspaper called "The Daily Alaska Empire," publish, and caused to be published, certain false, scandalous, defamatory, and libelous headlines, articles and editorial; that a complete photostatic copy of the front page of "The Daily Alaska Empire" for September 25, 1952, is attached hereto marked Exhibit "A" and made a part hereof by reference the same as though copied herein verbatim; that of the material appearing on said front page, the following false, scandalous, defamatory, and libelous portions were published of and concerning this plaintiff:

Headline:

“Bare ‘Special’ Ferry Fund”

Sub-headline:

“Reeve Raps Graft, Corruption”

Sub-headline:

“Gruening, Metcalf, Roden, Divert ‘Chilkoot’  
Cash to Private Bank Account”

News Article:

Entire article appearing two right hand columns, front page, including continuation right hand column, page two

Editorial:

Entire editorial entitled “Start Talking, Boys” center front page.

7. That said headlines, articles and editorial were maliciously published of and concerning plaintiff and were intended to and did expose plaintiff to the scorn, hatred and contempt of the general public and residents of Alaska and his friends and neighbors, and the same were intended to convey and did convey to the entire community and the general public the belief that plaintiff was dishonest and corrupt, and that he and his associates, Metcalf and Gruening, were guilty of the crime of embezzlement and of converting funds belonging to the Territory of Alaska to his and their own use, contrary to and in violation of law.

8. That the libel complained of herein was the culmination of a campaign of misrepresentation,

falsehood and calumny against the said Governor of Alaska, Ernest Gruening, intended to discredit and disgrace him and his associates in the administration of the affairs of the Territory of Alaska, including this plaintiff, and that the libel complained of herein and the campaign waged by the defendant for a long time prior thereto was wilful, wrongful and malicious and intended and designed to injure, disgrace and defame this plaintiff and to bring him into public disgrace and contempt.

That by reason of the false, malicious and defamatory publication aforesaid, plaintiff has been publicly disgraced and injured in his good name, to his damage in the sum of Fifty Thousand (\$50,000) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of Fifty Thousand (\$50,000) Dollars as compensatory or general damages and the sum of Fifty Thousand (\$50,000) dollars as punitive or exemplary damages, and for costs and a reasonable attorneys' fee herein.

KAY, ROBISON AND MOODY,  
/s/ HENRY RODEN,  
Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1953.

In the District Court for the Territory of Alaska  
First Judicial Division

No. 6726-A

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corpora-  
tion,

Defendant.

### AMENDED COMPLAINT

Comes now the plaintiff and files this amended complaint herein, and for a claim against the defendant, alleges:

1. That plaintiff has heretofore been, and now is, a citizen of Juneau, Alaska, and the duly appointed, qualified and acting Governor of the Territory of Alaska, and a person of good reputation among his neighbors and fellow citizens.

2. That under existing law the Governor of said Territory is ex-officio a member of what is commonly known as the "Territorial Board of Road Commissioners" for said Territory, and said Board is composed of the Governor, the Highway Engineer and the Treasurer of said Territory; that Henry Roden is the duly elected, qualified and acting Treasurer of said Territory; that Frank A. Metcalf



is the duly elected, qualified and acting Highway Engineer, and said two last named persons, together with this plaintiff, at all times herein mentioned, composed said Board of Road Commissioners and as such performed all duties assigned to it by the laws of said Territory.

3. That the defendant above named is a domestic corporation, engaged in the printing and publishing business and said corporation is the publisher and proprietor of that certain newspaper known as "The Daily Alaska Empire," printed and published at Juneau, Alaska, and of daily circulation in said town of Juneau and elsewhere in said Territory and other places.

4. That before the commission of the acts by defendant hereinafter complained of, the said Henry Roden, the said Frank A. Metcalf and this plaintiff, acting as the duly constituted Board of Territorial Road Commissioners, and pursuant to law, purchased and acquired for and on behalf of the Territory, the motor vessel "Chilkoot," and caused the same to be operated upon and in the waters of Southeastern Alaska for the transportation of passengers and the carrying of freight; that in order to operate said vessel as aforesaid it became and was necessary to employ seafaring men, purchase supplies and keep said vessel in seaworthy condition; that the cost and expenses thus incurred were paid, in part, by said Board out of revenues earned by said vessel.

5. That before the commission of the acts by defendant hereinafter complained of, one Oscar G. Olson had been the duly elected, qualified and acting Treasurer of the Territory of Alaska; that said Olson, upon indictment duly found by the Grand Jury for the Territory of Alaska, First Judicial Division, charging him, the said Olson with embezzlement of funds and money belonging to the Territory of Alaska, and coming into his possession as Treasurer of said Territory, entered his plea of guilty to such charges and upon such plea was duly sentenced by the United States District Court for the Territory of Alaska, First Judicial Division, and to serve such sentence in the penitentiary on McNeil's Island, in the State of Washington, and said Olson, at all times herein mentioned was and now is confined in said penal institution.

6. That on the 25th day of September, 1952, the above-named defendant, did then and there in the said newspaper called "The Daily Alaska Empire," publish, and caused to be published, certain false, scandalous, defamatory, and libelous headlines, articles and editorial; that a complete photostatic copy of the front page of "The Daily Alaska Empire" for September 25, 1952, is attached hereto marked Exhibit "A" and made a part hereof by reference the same as though copied herein verbatim; that of the material appearing on said front page, the following false, scandalous, defamatory, and libelous portions were published of and concerning this plaintiff:

Headline:

“Bare ‘Special’ Ferry Fund”

Sub-headline:

“Reeve Raps Graft, Corruption”

Sub-headline:

“Gruening, Metcalf, Roden, Divert ‘Chilkoot’  
Cash to Private Bank Account”

News Article:

Entire article appearing two right hand columns, front page, including continuation right hand column, page two.

Editorial:

Entire editorial entitled “Start Talking, Boys” center front page.

7. That said headlines, articles and editorial were maliciously published of and concerning plaintiff and were intended to and did expose plaintiff to the scorn, hatred and contempt of the general public and residents of Alaska and his friends and neighbors, and the same were intended to convey and did convey to the entire community and the general public the belief that plaintiff was dishonest and corrupt, and that he and his associates, Roden and Metcalf, were guilty of the crime of embezzlement and of converting funds belonging to the Territory of Alaska to his and their own use, contrary to and in violation of law.

8. That the libel complained of herein was the culmination of a campaign of misrepresentation,

falsehood and calumny against the plaintiff intended to discredit and disgrace him and his administration of the affairs of the Territory of Alaska, and that the libel complained of herein and the campaign waged against the plaintiff by the defendant for a long time prior thereto was wilful, wrongful and malicious and intended and designed to injure, disgrace and defame this plaintiff and to bring him into public disgrace and contempt.

That by reason of the false, malicious and defamatory publication aforesaid, plaintiff has been publicly disgraced and injured in his good name, to his damage in the sum of One Hundred Thousand (\$100,000) Dollars. That by reason of said false and malicious publication plaintiff demands exemplary and punitive damages against said defendant in the further sum of One Hundred Thousand (\$100,000) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of Two Hundred Thousand (\$200,000) Dollars and for costs and a reasonable attorneys' fee herein.

KAY, ROBISON AND MOODY,  
/s/ ERNEST GRUENING,  
Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1953.

In the District Court for the Territory of Alaska,  
First Judicial Division

No. 6727-A

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corpora-  
tion,

Defendant.

### AMENDED COMPLAINT

Comes Now the plaintiff and files this amended complaint herein, and for a claim against the defendant, alleges:

1. That plaintiff has heretofore been, and was at times mentioned herein, a citizen of Juneau, Alaska, and the duly elected, qualified and acting Highway Engineer of the Territory of Alaska, and a person of good reputation among his neighbors and fellow citizens.

2. That under existing law the Highway Engineer of said Territory is ex officio a member of what is commonly known as the "Territorial Board of Road Commissioners" for said Territory, and said Board is composed of the Governor, the Highway Engineer and the Treasurer of said Territory; that Henry Roden is the duly elected, qualified and

acting Treasurer of said Territory; that Ernest Gruening is the duly appointed, qualified and acting Governor, and said two last named persons, together with this plaintiff, at all times herein mentioned, composed said Board of Road Commissioners and as such performed all duties assigned to it by the laws of said Territory.

3. That the defendant above named is a domestic corporation, engaged in the printing and publishing business and said corporation is the publisher and proprietor of that certain newspaper known as "The Daily Alaska Empire," printed and published at Juneau, Alaska, and of daily circulation in said town of Juneau and elsewhere in said Territory and other places.

4. That before the commission of the acts by defendant hereinafter complained of, the said Henry Roden, the said Ernest Gruening and this plaintiff, acting as the duly constituted Board of Territorial Road Commissioners, and pursuant to law, purchased and acquired for and on behalf of the Territory, the motor vessel "Chilkoot," and cause the same to be operated upon and in the waters of Southeastern Alaska for the transportation of passengers and the carrying of freight; that in order to operate said vessel as aforesaid it became and was necessary to employ seafaring men, purchase supplies and keep said vessel in seaworthy condition; that the cost and expenses thus incurred were paid, in part, by said Board out of revenues earned by said vessel.

5. That before the commission of the acts by defendant hereinafter complained of, one Oscar G. Olson had been the duly elected, qualified and acting Treasurer of the Territory of Alaska; that said Olson, upon indictment duly found by the Grand Jury for the Territory of Alaska, First Judicial Division, charging him, the said Olson with embezzlement of funds and money belonging to the Territory of Alaska, and coming into his possession as Treasurer of said Territory, entered his plea of guilty to such charges and upon such plea was duly sentenced by the United States District Court for the Territory of Alaska, First Judicial Division, and to serve such sentence in the penitentiary on McNeil's Island, in the State of Washington, and said Olson, at all times herein mentioned was and now is confined in said penal institution.

6. That on the 25th day of September, 1952, the above-named defendant, did then and there in the said newspaper called "The Daily Alaska Empire," publish, and caused to be published, certain false, scandalous, defamatory, and libelous headlines, articles and editorial; that a complete photostatic copy of the front page of "The Daily Alaska Empire" for September 25, 1952, is attached hereto marked Exhibit "A" and made a part hereof by reference the same as though copied herein verbatim; that of the material appearing on said front page, the following false, scandalous, defamatory, and libelous portions were published of and concerning this plaintiff:

Headline:

“Bare ‘Special’ Ferry Fund”

Sub-headline:

“Reeve Raps Graft, Corruption”

Sub-headline:

“Gruening, Metcalf, Roden, Divert ‘Chilkoot’  
Cash to Private Bank Account”

News Article:

Entire article appearing two right hand columns, front page, including continuation right hand column, page two.

Editorial:

Entire editorial entitled “Start Talking Boys” center front page.

7. That said headlines, articles and editorial were maliciously published of and concerning plaintiff and were intended to and did expose plaintiff to the scorn, hatred and contempt of the general public and residents of Alaska and his friends and neighbors, and the same were intended to convey and did convey to the entire community and the general public the belief that plaintiff was dishonest and corrupt, and that he and his associates, Roden and Gruening, were guilty of the crime of embezzlement and of converting funds belonging to the Territory of Alaska to his and their own use, contrary to and in violation of law.

8. That the libel complained of herein was the culmination of a campaign of misrepresentation,



falsehood and calumny against the said Governor of Alaska, Ernest Gruening, intended to discredit and disgrace him and his associates in the administration of the affairs of the Territory of Alaska, including this plaintiff, and that the libel complained of herein and the campaign waged by the defendant for a long time prior thereto was wilful, wrongful and malicious and intended and designed to injure, disgrace and defame this plaintiff and to bring him into public disgrace and contempt.

That by reason of the false, malicious and defamatory publication aforesaid, plaintiff has been publicly disgraced and injured in his good name, to his damage in the sum of One Hundred Thousand (\$100,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand (\$100,000.00) Dollars and for costs and a reasonable attorneys' fee herein.

KAY, ROBISON AND MOODY,  
/s/ FRANK A. METCALF,  
Plaintiff.

Duly verified.

[Endorsed]: Filed April 16, 1953.

[Title of District Court and Cause.]

No. 6725-A

ANSWER OF DEFENDANT  
TO AMENDED COMPLAINT

Comes now the Empire Printing Company, a corporation, defendant above named, and in answer to the Complaint filed in the above-entitled case, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits the allegations contained in Paragraph IV.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Referring to the allegations contained in Paragraph VI, the defendant admits that it published in The Daily Alaska Empire the articles and editorial set forth in Exhibit "A" to plaintiff's Amended Complaint, and defendant denies that any portions

of the articles or editorial were false, scandalous, defamatory or libelous.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiff's Amended Complaint.

VIII.

Defendant denies each and every allegation contained in Paragraph VIII of the Amended Complaint, and in this connection alleges that plaintiff's reputation and name have remained the same since the publication of the articles complained of in Paragraph VI of the Amended Complaint, as they were before the publication of those articles.

For a further, separate and affirmative defense to plaintiff's Complaint, the defendant alleges as follows:

First Affirmative Defense

I.

Defendant realleges all the allegations and repeats the admissions and denials contained in Paragraphs I to VIII, inclusive, of its answer to the Amended Complaint as hereinabove set forth.

II.

That the articles complained of and referred to in plaintiff's Amended Complaint are set forth in full in Exhibit "A," "B" and "C" hereto attached and made a part of this Answer, and prayed to be read in connection herewith as fully as though set forth

in each and every paragraph to which reference is made thereto.

### III.

That all the facts stated in the articles complained of are true and correct, and as therein stated, and these facts are of record in the office of the Auditor of the Territory of Alaska and all opinions expressed in setting forth the facts are a fair comment thereon and privileged, as more fully set forth and claimed hereinafter.

### IV.

That all the facts set forth in the editorial contained on page one of the issue of the Empire of September 25, 1952, and contained in Exhibit "A" attached to plaintiff's Amended Complaint are true and correct and all comment made upon the facts set forth in the editorial are fair comment and privileged criticism, as more fully set forth hereinafter.

## Second Affirmative Defense

### I.

Defendant realleges all the allegations set forth in Paragraphs I to VI, inclusive, of its Answer to plaintiff's Complaint, and in Paragraphs I to IV, inclusive, of the First Affirmative Defense.

### II.

That the Daily Alaska Empire is a newspaper of general circulation published in Juneau, Alaska, and circulated and read throughout the Territory and

elsewhere, and one of its functions is to keep the people, the taxpayers and voters and all the inhabitants of the Territory, fully informed of the official acts of its Territorial and Federal officials, and especially to inform the taxpayers and inhabitants of the Territory of the disposition of public funds and all methods employed in the disbursement thereof, and to call attention of the public to all irregularities in the receipt, disbursement and handling of public funds, and the articles complained of by the plaintiff and which are set forth in Exhibits "A" and "B" to this answer were written for that purpose and on information furnished the defendant from public records and based upon information furnished by public officials, and that information is true, and one of the duties of the defendant in the publication of facts pertaining to the official acts of its officials and of the Federal officials dealing with Territorial affairs is to comment upon such facts, express opinions and draw conclusions for the benefit of the taxpayers, voters and inhabitants of the Territory of Alaska, and the defendant is privileged and it is its duty to make such comment.

### III.

That in the venture of the Territory into the transportation business as set forth in plaintiff's Complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of the vessel "Chilkoot," but in its operation, and one of the duties of the defendant is to inform the public of the facts and of all irregularities in the han-

dling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign. That Territorial Highway Engineer Frank A. Metcalf was a candidate for reelection to his office at the time the publication was made, and plaintiff is another elective official of the Territory, and the Governor is an appointed official appointed by the President of the United States, and at the time of the publication of the articles complained of there was an election pending for President of the United States and for members of Congress. That the Territorial election had been set by law for October 14, 1952, and the Presidential election for November 4, 1952.

#### IV.

That the publication complained of and which was based upon facts furnished the defendant and which the defendant firmly believed to be true, contained comments and opinions of the defendant which were based upon the belief of the officers of defendant that the facts were true, and that the comments and opinions expressed were justified, and these comments and opinions were not published for the purpose of injuring the plaintiff or anyone else, and they contained no statement or implication that the plaintiff had embezzled, stolen or converted to his own use any monies whatsoever, but the intention of the articles as a whole was to inform the general public, the taxpayers, inhabitants of the Territory and the candidates for public offices, including can-

didates for the Territorial legislature, that there were irregularities and illegal and unauthorized acts committed by the plaintiff, Gruening and Metcalf, in the receipt, handling and disbursement of public funds.

#### V.

That the matters covered by the publication aforesaid were matters of public concern in which the public of the Territory of Alaska was vitally interested, and the criticism of the acts of plaintiff, Gruening and Metcalf, was justified and based upon true and privileged statements of fact which were known and available to all members of the public, including the plaintiff; the opinions were the actual opinions of defendant and its officers, employees and writers, and they were not expressed for the purpose of causing harm to anyone, and they dealt only with the public conduct of public officials.

### Third Affirmative Defense

#### I.

As a third and separate Affirmative Defense, defendant realleges all the allegations, admissions and denials contained in the Answer to plaintiff's Complaint, and in the First and Second Affirmative Defenses.

#### II.

That on September 25, 1952, in the issue of the *Daily Alaska Empire* and on page one of the *Empire* and immediately adjoining the article complained of, the defendant published the explana-

tion of plaintiff and Frank A. Metcalf, Territorial Highway Engineer, who were the two members of the Territorial Board of Road Commissioners serving with the Governor, Ernest Gruening, and their opinion and explanation was published in detail and it was published for the purpose of giving to the public such explanation as the members of the Territorial Board of Road Commissioners, including this plaintiff, desired to give regarding the handling of the funds referred to. A full, true and correct copy of the statement of plaintiff and Metcalf is hereto attached and marked Exhibit "C," and prayed to be read as a part of this answer, and reference is made thereto as though fully set forth herein.

### III.

That at the time of the publication the Governor was not available for comment, but the Territorial Highway Engineer and the plaintiff constituted a majority of the membership of the Board, and their explanation and their statement has not at any time been denied in whole or in part by the Governor, and although the columns of the Daily Alaska Empire have been open to him at all times and all statements given by him to the defendant have been published in full.

### IV.

That there was no malice in the publications of September 25, 1952, which are complained of, and the publication was made solely in the public interest and for the purpose of giving information to



the public, as hereinabove alleged; and it was privileged criticism.

V.

That in order to emphasize the fact that there was no malice intended in the publication of articles complained of in plaintiff's Complaint and no intent to injure the plaintiff or to charge him with the commission of any crime, the defendant, on September 26, 1952, published in a prominent place on the front page of its issue of the Daily Alaska Empire of that date, in large type, a statement, a full, true and correct copy of which is hereto attached and marked Exhibit "D," and prayed to be read as a part of this Answer as though fully set forth in this paragraph, and to which reference is hereby made.

Wherefore defendant prays that plaintiff's Amended Complaint be dismissed, and that it have and recover from the plaintiff its costs and disbursements herein.

A jury is requested for the trial of the above-entitled cause.

Dated at Juneau, Alaska, this 11th day of August, 1953.

/s/ H. L. FAULKNER,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

**Duly Verified.**

## EXHIBIT "A"

Bare "Special" Ferry Fund

Gruening, Metcalf, Roden  
Divert "Chilkoot" Cash to  
Private Bank Account

Auditor Neil Moore and Assistant  
Attorney General John Dimond  
Halt Payments From Fund

By Jack D. Daum

To avoid paying territorial money into the general fund as provided by law, Governor Gruening, Treasurer Roden and Highway Engineer Frank Metcalf have set up a "special fund" at a Juneau bank, territorial auditor Neil Moore disclosed today.

#### Illegal Payments

The "special fund," which dated back to early last year, is in the B. M. Behrends bank under the name "Chilkoot Ferry—by Robert E. Coughlin." Into it have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged.

After learning of the unauthorized account late last month, Auditor Moore and assistant attorney general John Dimond ordered the bank to stop payment on all checks drawn against the account.

The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds.

### Bookkeeping Trick

The special account, established and maintained without knowledge of the territorial auditor, was set up to enable the highway engineer, Frank Metcalf, to keep the ferry receipts out of the normal channels of territorial finances, Moore declared. Metcalf labeled the move a "trick of bookkeeping" which permits him to operate the ferry without depleting the funds given him by the legislature to run his department.

Both Metcalf and Henry Roden, territorial treasurer, admitted the existence of the fund and did not deny that payments have been made from it.

They declared there was no provision in law under which the money could be kept in the highway engineer's department, and admitted they acted as members of the Territorial Board of road commissioners in side-tracking the money into a private bank instead of into the territorial treasury.

### Governor Absent

The third member of the board, Ernest Gruening, has not returned from his pre-election "road inspection" tour and was not available for comment today. He is expected to return to Juneau,

however, in time to attend a Democratic rally Saturday night.

When questioned by an Empire reporter, Metcalf produced a record of the June 6, 1951, meeting of the board of road commissioners, attended by himself, Roden, Gruening and J. Gerald Williams, territorial attorney general.

The minutes disclose discussion by the board as to the possibility of depositing ferry receipts in the motor fuel tax fund for use by the highway engineer instead of placing them into the general fund as required by law, where the money would be used for schools, hospitals and other territorial-wide benefits.

#### Abandon Scheme

This idea was abandoned, the minutes show, on the advice of Williams, who told the board such a transaction would be illegal.

Then, the minutes disclose, on a motion by Roden, the board decided to set up the "special account" in a private bank. There the money could be deposited and spent without the knowledge or approval of the auditor. Such an account was opened at Behrends bank, under the name "Robert E. Coughlin" instead of in the name of the board or of the highway engineer.

#### Opinion

On June 19, less than two weeks after the board meeting, Auditor Moore asked Attorney General Williams for an opinion as to where the receipts of

the ferry should be deposited. Williams replied on June 21 with the written opinion that, under Section 12-2-1, ACLA 1949, it is mandatory that the money be placed in the general fund.

Williams added, however, that a new act the 1951 Reorganization Act which Williams later declared invalid—the money could be deposited in the motor fuel fund. His letter to Moore did not mention the legality of the outside “special fund.”

### News to Moore

Auditor Moore learned of the existence of the unauthorized account late last month, when the ferryboat captain, Steve Larsson Homer, who resigned the position brought him the check Homer had received in payment for overtime.

Moore noted that the check was drawn on the “Chilkoot Ferry” account and was signed by Robert E. Coughlin. Homer, as a territorial employee, should have been paid by territorial warrant, Moore said. Homer then disclosed that some of the operating expenses of the ferry were being paid from the “special account.”

### Letter

The auditor then wrote the following letter, dated August 25, 1952, to Attorney General Williams:

“Mr. J. Gerald Williams,  
“Attorney General of Alaska,  
“Juneau, Alaska.

“Dear Mr. Williams :

“This office has irrefutable evidence that the Territorial Board of Road Commissioners, consisting of the Governor of Alaska, the Treasurer of Alaska, and the Highway Engineer, have violated the laws of the Territory and repeated opinions of your office relative to the handling of funds collected from shippers and travelers using the Territorial-owned ‘Chilkoot ferry.’

“For your information, the Board of Road Commissioners is paying claims against the Territory out of a special account which they have set up at B. M. Behrends Bank, of Juneau. This special account is made up from the receipts earned by the ferry, which receipts, according to your opinion, must be deposited in the General Fund by the Treasurer.

“The procedure followed by the said Board is the same as that followed by the former Treasurer of Alaska, i. e., unauthorized payments.

“Therefore, in view of your several opinions and the various Territorial laws, namely :

“Section 11-3-8, ACLA, 1949, ‘Salaries and expenses to be paid from appropriations’;

“Section 12-2-1, ACLA, 1949, ‘Territorial Moneys; Accounting and payment to Territorial Treasurer; covering into General Fund’; and

“Section 12-3-1, ACLA, 1949, ‘Disbursements: To be made on vouchers: Accountability of disbursing officers,’ which have all been ignored, the matter, because of its extreme seriousness, is being turned over to you to recover the money and to immediately stop all illegal payments of Territorial funds.

“Respectfully yours,

“NEIL F. MOORE,

“Auditor of Alaska.”

### Stop Order

Williams was out of town and did not receive this letter, but his assistant, John Dimond, read it and went immediately to Moore and to the bank to verify the charges. After learning such an account existed, Dimond and Moore ordered the bank to stop payment on all checks against the ferry fund. This order was verified by a letter from Moore the following day.

Since then there has been no further action in the case. Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr., who said last night he is the sole prosecuting officer in this division for territorial and federal criminal cases.

The Empire learned of the unprecedented transaction when Homer told the story to a reporter.

## EXHIBIT "B"

Start Talking, Boys  
(An Editorial)

Disclosed in today's Empire is a story almost too fantastic for belief, but the facts have been personally verified by both the territorial auditor and assistant attorney general.

By agreement between the governor, the treasurer and the highway engineer, territorial money has been diverted from the channels prescribed by law and placed in a "special account" to be disbursed without the approval or knowledge of the auditor, without territorial warrant, and by a man who is not a territorial officer.

The laws of Alaska, well known to Gruening, Roden and Metcalf, carefully spell out the method by which public money may be spent. The law stipulates that every expenditure by the department heads will be made by warrant and approved by the auditor.

This is no vague technicality hidden away in small print. It is a matter of law known and understood by every territorial employee who handles public money.

The law was designed to protect the taxpayers' interest. When money is received by the Territory it is placed in the general fund unless specifically earmarked by the legislature for other purposes. The



treasurer is the custodian of that money, and the auditor is the watchdog whose duty is to make certain it is legally spent.

Here we have three of Alaska's highest officials—two of them elected and the other a presidential appointee—setting up an outside bank account with the money which should have gone to the general fund. The minutes of the June 6, 1951, meeting of the board of road commissioners disclose that the decision to establish the fund was agreed upon by unanimous consent.

Disbursements from this fund were neither referred to nor approved by the auditor. The only name on the checks was that of Robert E. Coughlin.

Roden and Metcalf offer the explanation that the special treatment of this money was made necessary by an "emergency." They said the board had to act quickly in buying the ferry to keep it from going out of business, and that the receipts from the ferry operation had to be diverted so they could be used directly to pay operating costs.

If this method of by-passing the law is acceptable to the attorney general and the U. S. District Attorney, why is it not possible for every department head who finds himself running over his appropriation to set up "special funds" from the money his office takes in?

If disbursements by the highway engineer's department need not be approved by the auditor, why

should any other department take the trouble to obtain such an approval.

And if the law can be by-passed and disregarded in this case, why must anyone obey the law?

This is, of course, merely the latest in the many "deals" with which Gruening has closely aligned himself. His personal defense of the Palmer Airport Deal as a "highly intelligent transaction" still rings stridently in the ears of all honest Alaskans.

Yet the "highly honorable" Palmer Deal was denounced by a bi-partisan committee of United States senators as an underhanded attempt to cheat the federal government out of thousands of dollars of taxpayers' money.

We can rest assured that when the governor returns from his pre-election "road inspection" tour he will be the first to scream "politics" at Neil Moore's disclosure of this latest "deal."

But this is a case where Gruening, Roden and Metcalf will have to stand on their own feet and explain to Alaskans whether the territorial law is applicable to some and not to others or whether they acted in complete defiance to the law in the belief they would not be caught.

Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings.

## EXHIBIT "C"

Roden, Metcalf Say "Nothing Crooked" Here

Territorial treasurer Henry Roden and highway engineer, Frank Metcalf admitted this week that the board of road commissioners set up a "special fund" at the B. M. Behrends bank, and offered the following explanation of how it was done:

In the spring of 1951, when the owners of the M. V. Chilkoot decided to sell the ferry, there were no buyers available. There was a danger of the ferry, which connects Haines with Juneau, going out of business.

The board did not want to see the ferry go out of business because it had been advertised widely in the States that tourists could drive their cars to Haines, Juneau and Skagway. The board considered the ferry an integral part of the road system.

## Buy Ferry

In May, the board decided to buy the ferry, which it did, paying some \$30,000 for the boat and business.

The ferry's operation was placed under the control of Metcalf, who supervised the needed repairs, amounting to about \$29,000, and hired the necessary personnel.

To operate his department, Metcalf is allowed to spend only the money appropriated for it by the legislature. The ferry operation placed a strain on this money, threatening to deplete it.

Receipts from the ferry's operation would have bolstered the department's funds, but the attorney general advised that the law requires all monies paid the territory to go into the general fund. The receipts, therefore, could not legally be used to pay ferry operating expenses.

If the law were disregarded and the receipts poured back into the ferry, the act would come to the attention of the Auditor of Alaska, who is the territory's watchdog on money matters.

#### Bypass Auditor

Thus, the only method by which the money could be used without detection, to operate the ferry, was to keep the money separate from the normal financial channels of the Territory. To this end the board agreed, on June 6, 1951, to set up the "special account" in the bank and to deposit all receipts in this account instead of into the general fund.

The board further agreed to pay all operating expenses of the ferry out of this "special account." None of the vouchers for receipt of payment of this money was to go through the auditor's office.

Roden and Metcalf each insisted that there "is nothing crooked about this. The books are open for auditing any time." Metcalf termed the deal "just a trick of bookkeeping."

Governor Gruening, the third member of the board was not in town for comment.

EXHIBIT "D"

Attention

Our attention has been called to a paragraph in yesterday's lead story about the Chilkoot Ferry bank account. A parallel was drawn between this case and that of a former Territorial official now confined to a federal prison.

It was not our intention to infer that there has been any misappropriation or theft of these funds, but merely that in both cases, checks were drawn against territorial funds in bank accounts without being offered for the scrutiny of the Office of the Auditor as provided for by the law.

The Empire regrets any misunderstanding that may have arisen from this paragraph and hastens to repeat that there has been no evidence of any fraudulent or personal use of any of the funds in the special account.

[Endorsed]: Filed August 14th, 1953.

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[Title of District Court and Cause.]

No. 6726-A

ANSWER OF DEFENDANT  
TO AMENDED COMPLAINT

Comes now the Empire Printing Company, a corporation, defendant above named, and in answer

to the Complaint filed in the above-entitled case, admits, denies and alleges as follows:

I.

Referring to the allegations contained in Paragraph I, the defendant admits that the plaintiff has heretofore been a resident of Juneau, Alaska, and that he was for twelve years and until April 10, 1953, the duly-appointed and acting Governor of the Territory of Alaska, and with reference to the allegation regarding plaintiff's reputation, the defendant alleges that he has been for twelve years a controversial figure in Alaskan politics and that his reputation among a certain class who have been allied with him in politics has apparently been good, but it has been otherwise with more than an equal number of plaintiff's neighbors and fellow citizens and residents of the Territory.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits the allegations contained in Paragraph IV.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Referring to the allegations contained in Paragraph VI, the defendant admits that it published in *The Daily Alaska Empire* the articles and editorial set forth in Exhibit "A" to plaintiff's Amended Complaint, and defendant denies that any portions of the articles or editorial were false, scandalous, defamatory or libelous.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiff's Amended Complaint.

VIII.

Defendant denies each and every allegation contained in Paragraph VIII of the Amended Complaint, and in this connection alleges that plaintiff's reputation and name have remained the same since the publication of the articles complained of in Paragraph VI of the Amended Complaint, as they were before the publication of those articles.

For a further, separate and affirmative defense to plaintiff's Complaint, the defendant alleges as follows:

First Affirmative Defense

I.

Defendant realleges all the allegations and repeats the admissions and denials contained in Paragraphs I to VIII, inclusive, of its answer to the Amended Complaint as hereinabove set forth.

## II.

That the articles complained of and referred to in Plaintiff's Amended Complaint are set forth in full in Exhibits "A," "B" and "C" hereto attached and made a part of this Answer, and prayed to be read in connection herewith as fully as though set forth in each and every paragraph to which reference is made thereto.

## III.

That all the facts stated in the articles complained of are true and correct, and as therein stated, and these facts are of record in the office of the Auditor of the Territory of Alaska and all opinions expressed in setting forth the facts are a fair comment thereon and privileged, as more fully set forth and claimed hereinafter.

## IV.

That all the facts set forth in the editorial contained on page 1 of the issue of the Empire of September 25, 1952, and contained in Exhibit "A" attached to plaintiff's Amended Complaint are true and correct and all comment made upon the facts set forth in the editorial are fair comment and privileged criticism, as more fully set forth hereinafter.

## Second Affirmative Defense

## I.

Defendant realleges all the allegations set forth in Paragraphs I to VI, inclusive, of its Answer to plaintiff's Complaint, and in Paragraphs I to IV inclusive of the First Affirmative Defense.



## II.

That the Daily Alaska Empire is a newspaper of general circulation published in Juneau, Alaska, and circulated and read throughout the Territory and elsewhere, and one of its functions is to keep the people, the taxpayers and voters and all the inhabitants of the Territory, fully informed of the official acts of its Territorial and Federal officials, and especially to inform the taxpayers and inhabitants of the Territory of the disposition of public funds and all methods employed in the disbursement thereof, and to call attention of the public to all irregularities in the receipt, disbursement and handling of public funds, and the articles complained of by the plaintiff and which are set forth in Exhibits "A" and "B" to this answer were written for that purpose and on information furnished the defendant from public records and based upon information furnished by public officials, and that information is true, and one of the duties of the defendant in the publication of facts pertaining to the official acts of its officials and of the Federal officials dealing with Territorial affairs is to comment upon such facts, express opinions and draw conclusions for the benefit of the taxpayers, voters and inhabitants of the Territory of Alaska, and the defendant is privileged and it is its duty to make such comment.

## III.

That in the venture of the Territory into the transportation business as set forth in plaintiff's Complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of

the vessel "Chilkoot," but in its operation, and one of the duties of the defendant is to inform the public of the facts and of all irregularities in the handling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign. That Territorial Highway Engineer Frank A. Metcalf was a candidate for re-election to his office at the time the publication was made, and the Treasurer Henry Roden is another elective official of the Territory, and the plaintiff is an appointed official, appointed by the President of the United States, and at the time of the publication of the articles complained of there was an election pending for President of the United States and for members of Congress. That the Territorial election had been set by law for October 14, 1952, and the Presidential election for November 4, 1952.

#### IV.

That the publication complained of and which was based upon facts furnished the defendant and which the defendant firmly believed to be true, contained comments and opinions of the defendant which were based upon the belief of the officers of defendant that the facts were true, and that the comments and opinions expressed were justified, and these comments and opinions were not published for the purpose of injuring the plaintiff or anyone else, and they contained no statement or implication that the plaintiff had embezzled, stolen or converted to his own use any monies whatsoever, but the intention

of the articles as a whole was to inform the general public, the taxpayers, inhabitants of the Territory and the candidates for public offices, including candidates for the Territorial legislature, that there were irregularities and illegal and unauthorized acts committed by the plaintiff, Roden and Metcalf, in the receipt, handling and disbursement of public funds.

## V.

That the matters covered by the publication aforesaid were matters of public concern in which the public of the Territory of Alaska was vitally interested, and the criticism of the acts of plaintiff, Roden and Metcalf, was justified and based upon true and privileged statements of fact which were known and available to all members of the public, including the plaintiff; the opinions were the actual opinions of defendant and its officers, employees and writers, and they were not expressed for the purpose of causing harm to anyone, and they dealt only with the public conduct of public officials.

## Third Affirmative Defense

### I.

As a third and separate Affirmative Defense, defendant realleges all the allegations, admissions and denials contained in the Answer to plaintiff's Complaint, and in the First and Second Affirmative Defenses.

### II.

That on September 25, 1952, in the issue of the Daily Alaska Empire and on page one of the

Empire and immediately adjoining the article complained of, the defendant published the explanation of Henry Roden, Territorial Treasurer, and Frank A. Metcalf, Territorial Highway Engineer, who were the two members of the Territorial Board of Road Commissioners serving with the plaintiff, and their opinion and explanation was published in detail and it was published for the purpose of giving to the public such explanation as the members of the Territorial Board of Road Commissioners, including this plaintiff, desired to give regarding the handling of the funds referred to. A full, true and correct copy of the statement of Roden and Metcalf is hereto attached and marked Exhibit "C," and prayed to be read as a part of this answer, and reference is made thereto as though fully set forth herein.

### III.

That at the time of the publication the plaintiff was not available for comment, but the Territorial Highway Engineer and the Territorial Treasurer constituted a majority of the membership of the Board, and their explanation and their statement has not at any time been denied in whole or in part by the plaintiff, and although the columns of the Daily Alaska Empire have been open to him at all times and all statements given by him to the defendant have been published in full.

### IV.

That there was no malice in the publications of September 25, 1952, which are complained of, and

the publication was made solely in the public interest and for the purpose of giving information to the public, as hereinabove alleged; and it was privileged criticism.

V.

That in order to emphasize the fact that there was no malice intended in the publication of articles complained of in plaintiff's Complaint and no intent to injure the plaintiff or to charge him with the commission of any crime, the defendant, on September 26, 1952, published in a prominent place on the front page of its issue of the Daily Alaska Empire of that date, in large type, a statement, a full, true and correct copy of which is hereto attached and marked Exhibit "D," and prayed to be read as a part of this Answer as though fully set forth in this paragraph, and to which reference is hereby made.

Wherefore, defendant prays that plaintiff's Amended Complaint be dismissed, and that it have and recover from the plaintiff its costs and disbursements herein.

A jury is requested for the trial of the above-entitled cause.

Dated at Juneau, Alaska, this 11th day of August, 1953.

/s/ H. L. FAULKNER,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Duly Verified.

[Exhibit A, B, C and D attached to the foregoing are identical to Exhibits A, B, C and D attached to the Answer, Cause No. 6725-A, set out in full, pages 26 to 37 of this printed record.]

[Endorsed]: Filed August 14th, 1953.

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[Title of District Court and Cause.]

No. 6727-A

ANSWER OF DEFENDANT  
TO AMENDED COMPLAINT

Comes now the Empire Printing Company, a corporation, defendant above named, and in answer to the Complaint filed in the above-entitled case, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits the allegations contained in Paragraph IV.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Referring to the allegations contained in Paragraph VI, the defendant admits that it published in the Daily Alaska Empire the articles and editorial set forth in Exhibit "A" to plaintiff's Amended Complaint, and defendant denies that any portions of the articles or editorial were false, scandalous, defamatory or libelous.

VII.

Defendant denies the allegations contained in Paragraph VII of plaintiff's Amended Complaint.

VIII.

Defendant denies each and every allegation contained in Paragraph VIII of the Amended Complaint, and in this connection alleges that plaintiff's reputation and name have remained the same since the publication of the articles complained of in Paragraph VI of the Amended Complaint, as they were before the publication of those articles.

For a further, separate and affirmatives defense to plaintiff's Complaint, the defendant alleges as follows:

First Affirmative Defense

I.

Defendant realleges all the allegations and repeats the admissions and denials contained in Paragraphs I to VIII, inclusive, of its answer to the Amended Complaint as hereinabove set forth.

II.

That the articles complained of and referred to in

plaintiff's Amended Complaint are set forth in full in Exhibits "A," "B" and "C" hereto attached and made a part of this Answer, and prayed to be read in connection herewith as fully as though set forth in each and every paragraph to which reference is made thereto.

### III.

That all the facts stated in the articles complained of are true and correct, and as therein stated, and these facts are of record in the office of the Auditor of the Territory of Alaska and all opinions expressed in setting forth the facts are a fair comment thereon and privileged, as more fully set forth and claimed hereinafter.

### IV.

That all the facts set forth in the editorial contained on page one of the issue of the Empire of September 25, 1952, and contained in Exhibit "A" attached to plaintiff's Amended Complaint are true and correct and all comment made upon the facts set forth in the editorial are fair comment and privileged criticism, as more fully set forth hereinafter.

## Second Affirmative Defense

### I.

Defendant realleges all the allegations set forth in Paragraphs I to VI, inclusive, of its Answer to plaintiff's Complaint, and in Paragraphs I to IV, inclusive, of the First Affirmative Defense.

### II.

That the Daily Alaska Empire is a newspaper of general circulation published in Juneau, Alaska,



and circulated and read throughout the Territory and elsewhere, and one of its functions is to keep the people, the taxpayers and voters and all the inhabitants of the Territory, fully informed of the official acts of its Territorial and Federal officials, and especially to inform the taxpayers and inhabitants of the Territory of the disposition of public funds and all methods employed in the disbursement thereof, and to call attention of the public to all irregularities in the receipt, disbursement and handling of public funds, and the articles complained of by the plaintiff and which are set forth in Exhibits "A" and "B" to this answer were written for that purpose and on information furnished the defendant from public records and based upon information furnished by public officials, and that information is true, and one of the duties of the defendant in the publication of facts pertaining to the official acts of its officials and of the Federal officials dealing with Territorial affairs is to comment upon such facts, express opinions and draw conclusions for the benefit of the taxpayers, voters and inhabitants of the Territory of Alaska, and the defendant is privileged and it is its duty to make such comment.

### III.

That in the venture of the Territory into the transportation business as set forth in plaintiff's Complaint, there has been a very substantial loss of public funds, not only in the purchase and repair of the vessel "Chilkoot," but in its operation, and one of the duties of the defendant is to inform the

public of the facts and of all irregularities in the handling of funds, whether these irregularities were in good faith or otherwise, and it was especially the duty of the defendant to publish such facts during an election campaign. That plaintiff was a candidate for re-election to his office at the time the publication was made, and the Treasurer Henry Roden is another elective official of the Territory, and the Governor is an appointed official appointed by the President of the United States, and at the time of the publication of the articles complained of there was an election pending for President of the United States and for members of Congress. That the Territorial election had been set by law for October 14, 1952, and the Presidential election for November 4, 1952.

#### IV.

That the publication complained of and which was based upon facts furnished the defendant and which the defendant firmly believed to be true, contained comments and opinions of the defendant which were based upon the belief of the officers of defendant that the facts were true, and that the comments and opinions expressed were justified, and these comments and opinions were not published for the purpose of injuring the plaintiff or anyone else, and they contained no statement or implication that the plaintiff had embezzled, stolen or converted to his own use any monies whatsoever, but the intention of the articles as a whole was to inform the general public, the taxpayers, inhabitants of the Territory and the candidates for public offices, including can-

didates for the Territorial Legislature, that there were irregularities and illegal and unauthorized acts committed by the plaintiff, Gruening and Roden, in the receipt, handling and disbursement of public funds.

#### V.

That the matters covered by the publication aforesaid were matters of public concern in which the public of the Territory of Alaska was vitally interested, and the criticism of the acts of plaintiff, Gruening and Roden, was justified and based upon true and privileged statements of fact which were known and available to all members of the public, including the plaintiff; the opinions were the actual opinions of defendant and its officers, employees and writers, and they were not expressed for the purpose of causing harm to anyone, and they dealt only with the public conduct of public officials.

### Third Affirmative Defense

#### I.

As a third and separate Affirmative Defense, defendant realleges all the allegations, admissions and denials contained in the Answer to plaintiff's Complaint, and in the First and Second Affirmative Defenses.

#### II.

That on September 25, 1952, in the issue of the Daily Alaska Empire and on page one of the Empire and immediately adjoining the article complained of, the defendant published the explanation

of plaintiff and Henry Roden, Territorial Treasurer, who were the two members of the Territorial Board of Road Commissioners serving with the Governor, Ernest Gruening, and their opinion and explanation was published in detail and it was published for the purpose of giving to the public such explanation as the members of the Territorial Board of Road Commissioners, including this plaintiff, desired to give regarding the handling of the funds referred to. A full, true and correct copy of the statement of plaintiff and Roden is hereto attached and marked Exhibit "C," and prayed to be read as a part of this answer, and reference is made thereto as though fully set forth herein.

### III.

That at the time of the publication the Governor was not available for comment, but the Territorial Treasurer and the plaintiff constituted a majority of the membership of the Board, and their explanation and their statement has not at any time been denied in whole or in part by the Governor, and although the columns of the Daily Alaska Empire have been open to him at all times and all statements given by him to the defendant have been published in full.

### IV.

That there was no malice in the publications of September 25, 1952, which are complained of, and the publication was made solely in the public interest and for the purpose of giving information to the public, as hereinabove alleged; and it was privileged criticism.

V.

That in order to emphasize the fact that there was no malice intended in the publication of articles complained of in plaintiff's Complaint and no intent to injure the plaintiff or to charge him with the commission of any crime, the defendant, on September 26, 1952, published in a prominent place on the front page of its issue of the Daily Alaska Empire of that date, in large type, a statement, a full, true and correct copy of which is hereto attached and marked Exhibit "D," and prayed to be read as a part of this Answer as though fully set forth in this paragraph, and to which reference is hereby made.

Wherefore, defendant prays that plaintiff's Amended Complaint be dismissed, and that it have and recover from the plaintiff its costs and disbursements herein.

A jury is requested for the trial of the above-entitled cause.

Dated at Juneau, Alaska, this 11th day of August, 1953.

/s/ H. L. FAULKNER,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Duly Verified.

[Exhibits A, B, C and D attached to the foregoing are identical to Exhibits A, B, C and D attached to the Answer, Cause No 6725-A, set out in full, pages 26 to 37 of this printed record.]

[Endorsed]: Filed August 14th, 1953.

In the United States District Court for the District  
of Alaska Division Number One, at Juneau

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

No. 6726-A

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

No. 6727-A

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

### ORDER FOR CONSOLIDATION

The court having examined the pleadings in the above-captioned cases, which are all libel suits against the defendant, and it appearing that the issues of fact and of law are common to all cases,

and that it would be an unnecessary expense to all parties and to the government if separate trials were had of the issues involved in the cases,

Now, Therefore, under the provisions of Rule 42(a) of the Federal Rules of Civil Procedure, it is hereby

Ordered, that the above-entitled cases be consolidated and tried jointly.

Dated at Juneau, Alaska, this 24th day of September, 1954.

/s/ GEORGE W. FOLTA,  
Judge.

[Endorsed]: Filed September 28th, 1954.

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[Title of District Court and Cause.]

Nos. 6725-A, 6726-A and 6727-A

MOTION OF DEFENDANT FOR  
DIRECTED VERDICT

Defendant now moves the court to direct the jury to find verdicts for defendant in the three consolidated cases. This motion is based on grounds as follows:

First:

The article published by defendant on September 25, 1952, entitled "Reeve Raps Graft; Corruption" made no reference directly or indirectly to any one

of the defendants. No innuendo or implication is contained in this article which could be construed as libel of anyone. Its appearance on the front page of the newspaper of defendant as a news item in a political campaign could harm no one.

Second:

The uncontroverted evidence is that the article containing the "story," or report of the setting up of the special ferry fund, recited true facts as given to the reporter from an official source. This is not libel. The handling of the ferry funds, which were public monies, was a violation of the laws of Alaska, namely Ch. 133, Session Laws, 1951, or Sections 12-2-1 and 12-3-1 A.C.L.A. 1949. It could not be libel for defendant to make the statement that plaintiffs had violated the laws of Alaska in the receipt and disbursement of public monies.

Third:

The comments in the article containing the facts about the ferry fund, and in the editorial, which contained the references to Oscar Olson, were fair comment and absolutely privileged. This is for the reason that the facts show, that while no claim is made that plaintiffs stole, or converted any public funds to their own use, the manner of handling the ferry funds, being a violation of the law, made the plaintiffs subject to the provisions of the same law, which Oscar Olson, former Treasurer of Alaska, had violated and for which violation he had been sentenced to prison. This law is found in Section 65-5-63 A.C.L.A. 1949. There could be no libel in



drawing the parallel to the Olson case and even if malice had existed, it would be immaterial.

Dated at Juneau, Alaska, the 18th day of November, 1955.

/s/ H. L. FAULKNER,  
Attorney for Defendant.

Denied.

[Endorsed]: Filed November 18th, 1955.

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In the District Court for the District of Alaska  
Division Number One

Nos. 6725-A, 6726-A and 6727-A

ERNEST GRUENING, et al.,

Plaintiffs,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Members of the Jury:

Instruction No. 1

The three actions above numbered were brought by Ernest Gruening, Henry Roden and Frank Metcalf against the Empire Printing Company, owner and publisher of a daily newspaper called the "Daily Alaska Empire" and published at Juneau.

Since the issues of law and fact are the same in the three cases, they were consolidated for trial and have all been tried together.

The plaintiffs complain that on September 25, 1952, the defendant published certain articles in its newspaper, concerning the three plaintiffs, which injured them and caused them damage. Therefore, these are what is known as libel suits.

The published articles complained of are set forth as Exhibits to the complaints, and also as Exhibits to defendant's answers. You will be given these complaints and answers to take with you to the jury room when you retire.

The plaintiffs, at the time of the publications, were all public officials. Plaintiff Ernest Gruening was governor of Alaska; Roden was Territorial Treasurer, and Metcalf was Highway Engineer. These three constituted the Board of Road Commissioners of Alaska.

#### Instruction No. 2

There is no statute in Alaska which defines civil libel; that is the libel which plaintiffs claim is involved in these cases. Many states have laws which do define civil libel, but we have no such statutes in Alaska. Therefore, the definition which you must adopt is what is known as the common law definition. The common law definition of libel is:

“Every false and unprivileged publication which exposes a person to hatred, ridicule, con-

tempt or obloquy or causes him to be shunned or avoided or which tends to injure him in his occupation.”

Golden North Airways vs. Tanana Pub. Co.,  
218 Fed. 2nd, 612 (U. S. Court App., 9th  
Cir.) at page 623.

You will note that to constitute libel, the publication must be false and unprivileged. It is not enough that it be false if it is privileged, and it is not enough if it be true even though it be unprivileged. The publication must be both false and unprivileged.

### Instruction No. 3

The court instructs you that the facts reported in the published articles complained of are established by the evidence in this case. The only thing remaining for you to consider is whether the comment on those facts was fair comment and privileged criticism. Fair comment is not libel. (Golden North Airways vs. Tanana Pub. Co., 218 Fed. 2d, p. 612 at p. 627; U. S. Ct. of Appeals, 9th Cir.)

“Privileged criticism” or “privileged publication” arises where the publication contains a correct or substantially correct statement of facts and the criticism is based on those facts. The general rule is:

“(1) Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory,

“(a) is upon,

“(I) A true or privileged statement of fact, or

“(II) upon facts otherwise known or available to the recipient as a member of the public, and

“(b) represents the actual opinion of the critic, and

“(c) is not made solely for the purpose of causing harm to the other.”

Restatement Law of Torts: Sec. 606, p. 275.

#### Instruction No. 4

The plaintiffs complain of the publication of certain articles in defendant's newspaper, all of which are set up in the Exhibits to the complaint, and referred to in paragraph 6 of the amended complaint of Ernest Gruening, No. 6726-A. The defendant admits the publications. Plaintiffs, in their complaint, say that the publications were “false, scandalous, defamatory and libelous,” and the plaintiff, Gruening and the other plaintiffs allege that they were the “culmination of a campaign of misrepresentation, falsehood and calumny” by the defendant against plaintiff Gruening; that they were “wilful, wrongful and malicious and intended and designed to injure, disgrace and defame him” and “bring him into public disgrace and contempt.” Therefore, the plaintiffs allege malice. “Malice” in its common acceptation means ill will toward some person. In

its legal sense it applies to a wrongful act done intentionally, without legal justification or excuse. One may do an act wilfully and yet be free from malice.

(Black's Law Dictionary.)

The defendant, in its answers, denies that the articles complained of were false, defamatory, scandalous or libelous. It alleges that the articles were mostly facts obtained from official sources, with certain comments thereon, and that the whole articles complained of, were privileged, and the comments by defendant were based on the facts and were what is known as fair comment and privileged criticism. Defendant further alleges that it is the function and duty of a newspaper to publish such facts to taxpayers, voters and to all inhabitants of the Territory, and to make such comments, express such opinion, and draw such conclusions for the benefit of the public, by way of criticism or otherwise as the facts warrant. Defendant further states in its answers, that there was no malice in the publications and that they were made solely in the public interest.

You are instructed that malice means actual evil-mindedness. There is no presumption of the existence of malice in any libel suit and when malice is claimed, it must be proved from an interpretation of the writing, its malignity, or intemperance by showing recklessness in making the charge, perniciousness in circulating or repeating it, the situations and

relations of the parties, the facts and circumstances surrounding the publication, and by its falsity.

Coleman vs. McLennan, 98 Pac. 281, at pp. 291-292.

#### Instruction No. 5

You are instructed that you are to disregard the article complained of which bore the headline, "Reeve Raps Graft, Corruption." It has not been shown that this article even remotely refers to any one of the plaintiffs. Furthermore, that appears from reading the article. It has no connection with anything else which appears in the "Empire" on September 25, 1952, and therefore should have no place in your deliberations.

#### Instruction No. 6

You are instructed that there can be no dispute about the facts published with reference to the setting up of the Special Ferry Fund, and of the receipts and disbursements of moneys in connection with the operation of the "Chilkoot" or Haines ferry. This was done on the express authority of plaintiffs acting as the Board of Road Commissioners for Alaska. I instruct you that this was a violation of the laws of Alaska.

Section 14 of Chapter 133, S.L.A. 1951, reads as follows:

"All receipts from any source whatever shall be forwarded to the Territorial Treasurer each day, or

as promptly as practicable, and at the same time a report of all receipts since the last previous report and of the disposition thereof shall be submitted to the Commissioner of Finance by the depositing agency. All monies received by the Treasurer during any month shall be credited by him and by the Commissioner of Finance to the proper funds not later than the first day of the following month.”

Section 28 of Chapter 133, S.L.A., 1951, reads as follows:

“Section 7-1-6, sub-section (b), A.C.L.A., 1949, is hereby repealed and re-enacted so as to read as follows:

“Section 7-1-6. (b-1) The Treasurer shall disburse public monies by check only and then only upon warrants drawn upon him by the Commissioner of Finance or as otherwise provided by law, not inconsistent with this Act. Such warrants shall be paid by the Treasurer when presented and from proper appropriations, but funds shall be retained in the Treasury to meet payments of all warrants issued prior to the ones presented and paid, and the Treasurer shall keep such records as will accurately reflect the receipts of and checks issued against the general and each special fund, the cash balance available for disbursement in each such fund, all bank balances and other records necessary to reflect the current cash position and effectuate treasury and bank reconciliation.”

Sub-section (b) of Section 11, Chapter 133, S.L.A. 1951, reads as follows:

“(b) No payment shall be made and no obligation shall be incurred against any fund, allotment, or appropriation unless the Commissioner shall first certify that there is a sufficient unencumbered balance in such fund, allotment or appropriation, after taking into consideration all previous expenditures and outstanding obligations, to meet the same. Every expenditure or obligation authorized or incurred in violation of the provisions of this Act shall be deemed illegal, and every official knowingly authorizing or making such payment, or taking part therein, and every person receiving such payment knowing it to be unlawful, or any part thereof, shall be jointly and severally liable to the Territory for the full amount so paid or received. If any appointive officer or employee of the Territory shall knowingly incur any obligation or shall authorize or make any expenditure in violation of the provisions of this Act, or take part therein, it shall be ground for his removal by the appointing authority, and if the appointing authority be other than the Board of Administration and shall fail to remove such officer or employee, the Board of Administration may exercise such power of removal, after giving notice of the charges and opportunity for hearing thereon to the accused officer or employee and to the appointing authority.”

It is also undisputed that the certified public accountants and auditors who audited the books and



accounts of the Territory; its boards, agencies and officials for the years 1951-2, found discrepancies in the special ferry fund account and a shortage of \$300.58, and that they also found that the accounts had not been accurately kept, but kept in such manner that it was impossible to ascertain from any source the exact status of the ferry funds.

#### Instruction No. 6

You are instructed that there can be no dispute about the facts published with reference to the setting up of the Special Ferry Fund, and of the receipts and disbursements of moneys in connection with the operation of the "Chilkoot" or Haines ferry. This was done on the express authority of plaintiffs acting as the Board of Road Commissioners for Alaska. I instruct you that this was a violation of the laws of Alaska.

Section 12-2-1 ACLA 1949 reads as follows:

"Every officer, board, commission or bureau authorized to collect or receive any fees, licenses, taxes or other money, and every office, commission or bureau of the United States, or other authorized agency authorized to collect any fees, licenses, taxes or other money belonging to this Territory, shall account for and pay such fees, licenses, taxes or other money, less any fees he may be entitled to under existing law, to the Territorial Treasurer at least once each month and the same shall be covered into the general fund."

Section 12-3-1 reads:

“Disbursing officers of the Territory of Alaska shall (1) disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the department, establishment or agency concerned, or by an officer or employee thereof duly authorized in writing by such head to certify such vouchers; (2) make such examination of vouchers as may be necessary to ascertain whether they are in proper form, duly certified and approved, and correctly computed on the basis of the facts certified; and (3) be held accountable accordingly.”

It is also undisputed that the certified public accountants and auditors who audited the books and accounts of the Territory; its boards, agencies and officials for the years 1951-2, found discrepancies in the special ferry fund account and a shortage of \$300.58, and that they also found that the accounts had not been accurately kept, but kept in such manner that it was impossible to ascertain from any source, the exact status of the ferry funds.

#### Instruction No. 7

In the articles complained of, it is stated that the case closely parallels that of Oscar Olson in the receipt and disbursement of public funds.

You are instructed that since Olson pleaded guilty in this court to embezzlement and since the articles, as written, accused the plaintiffs of illegally receiving and disbursing public funds, the comparison

with the Olson case is not a comment but a fact. The law defining the crime of embezzlement covers cases where public funds are converted by the defendant to his own use and also where they are not received and disbursed in accordance with the statutes of the Territory. It also covers deposits in bank accounts of public funds without authority of law. All of these acts constitute embezzlement so that in this connection there is no difference in law between the acts of Olson and the acts of the plaintiffs in this case and the parallel was a fact and its publication, therefore, would not be libel.

#### Instruction No. 8

The comment and criticism in this case complained of is the parallel drawn to the Oscar Olson case. The facts show that Olson, a former Treasurer of Alaska, had also set up a private bank account contrary to law. He embezzled public funds, causing a loss to the taxpayers. For this he was indicted and imprisoned.

The defendant avers in its pleading that its comment and criticism of plaintiffs did not imply that they had stolen any funds, and it now claims that the parallel consisted of the violation of the law and the loss of public funds in both cases. In the one case the monies were lost through theft; in the other case through some as yet unexplained means. In both cases there was a violation of Territorial law and a loss of public funds. Defendant says this is the parallel meant.

In considering whether defendant's comment was fair and its criticism justified, you must not consider whether you, or any one of you would have made the same or a similar comment. You must consider only whether defendant, its reporters, editors or manager, in good faith considered it to be fair comment and privileged. The test is whether a fair minded person might reasonably draw the same inference from facts truly stated, and that the inference represents the honest opinion of the writer.

Foley vs. Press Pub. Co.,  
235 N.Y. Supp. 340.

It is not, therefore, what the jury feels its members would have done or said; but whether they believe the publisher of the article honestly thought, in good faith, the comment made on the facts, was fair comment and privileged. It is sufficient if a reasonable man may honestly entertain such an opinion.

#### Instruction No. 9

In connection with the intention of the publisher in drawing the parallel to the Olson case, you should take into consideration the statement published on the front page of the Empire on September 26th, the day after the publication of the articles complained of, in which it is stated that no charge of theft was implied and that defendant did not wish to be misunderstood in this respect. This statement is Exhibit D in the answers.

You should also take into consideration the fact that defendant opened its columns to plaintiffs on

the same day as the articles complained of were published, and that their explanations in full were published on the same day and on the same page of the paper. This explanation of their actions is set forth on plaintiff's Exhibit "A" to their complaints.

#### Instruction No. 10

It is admitted that on the day following the publications complained of, the defendant published in a prominent place on the front page of its paper for that day, a statement that the articles concerning the plaintiffs, published on September 25, 1952, should not be taken to mean that the defendant had charged plaintiffs with theft or misappropriation of funds. This article is set forth in Exhibit "D" to each amended answer.

This must be considered by you only if you first find plaintiffs or any of them were damaged by the publications on September 25th. It should then be considered in mitigation or reduction of any damages which you might find, if you should find that plaintiffs suffered any such damages.

You are instructed, if you find this statement published on September 26, 1952, to have been fair and unequivocal, you should consider its bearing on defendant's defense of lack or absence of malice.

(Am. Jur. Vol. 33 p. 202, sec. 218.)

#### Instruction No. 11

All the plaintiffs were, at the time of the publication complained of, public officials. The Govern-

nor was an appointed official and the Treasurer and Highway Engineer were elected by the voters.

Public officials enjoy certain unqualified privileges in connection with their spoken and printed statements to other public officials and to the general public, and they possess immunity for almost any press release they care to make, so long as it is more or less in connection with general matters committed by law to their control or supervision.

Spalding vs. Vilas,  
161 U.S. 483.

Matson vs. Margiotti,  
88 Atl. 2nd 892.

Glass vs. Ickes,  
117 Fed. 2nd 273.

Mellon vs. Brewer,  
18 Fed. 2nd 168.

Conversely criticism and comment, even though severe and extravagant, of public officials is more readily justified than criticism of persons in private life.

Publications by which it is sought to convey pertinent information to the public in matters of public interest are permitted wide latitude. In controversies of a political nature, in particular, the circumstances often relieve statements, which might otherwise be actionable, of possible defamatory imputations. Mere expressions of opinion or severe criticism are not libelous if they clearly go only

to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the attack.

(Howard vs. Southern California Associated Newspapers;

213 Pac. p. 402 cited by U. S. Court of Appeals in Golden North Airways case 218 Fed. 2nd at page 628.)

In all matters that are entirely of a public nature, such as the conduct of public officials, the proceedings and acts of all persons who are responsible to the public at large, the proceedings, acts and conduct are deemed to be public property, and all bona fide and honest remarks upon such persons and their conduct may be made with perfect freedom.

Coleman vs. McLennan,  
98 Pac. 281.

A newspaper's right to comment on facts, criticize and draw inferences from facts pertaining to the acts of public officials is the same as that of an individual in his conversation with other individuals.

What one may lawfully speak, he may lawfully write and publish.

Yankwich "It's Libel or Contempt If You Print It" page 303 and cases there cited.

## Instruction No. 12

The plaintiff, Frank Metcalf, was at the time of the publications involved in this case, a candidate for re-election to the office of Highway Engineer. That fact allows a newspaper more latitude in commenting on his official acts than would be allowed if he were in private life and not a candidate. This is because the public has the right to be informed of the qualifications and to hear and read every honest statement either commending him or criticizing him.

It is fit and proper that newspapers should be free to give the public all facts obtainable about candidates for public office and to make all honest comment on those facts. It is one thing to publish false statements as facts and then to comment unfairly on those statements, and quite another thing to comment on actual facts, and draw conclusions and publish opinions which may adversely affect those whose acts and conduct have been correctly and truthfully reported. I repeat: that full and free discussion of all acts of officials which affect the public is sanctioned by the law. Honesty is least likely to suffer serious injury from full and free discussion of facts and comment thereon, even when that free discussion and comment affects it unjustly.

Coleman vs. McLennan,

98 Pac. 281.



## Instruction No. 13

In considering this case, bear in mind what I have said about the facts contained in the published articles which are the basis of the complaints. These facts have not been controverted. Therefore they stand as true, and you will not have any duty with reference to their determination.

But in arriving at correct answers to the questions the court will submit to you in connection with your verdict, you must take the published articles as a whole, and hold them up figuratively by the four corners, and first taking the established facts as true, determine whether any reasonable and honest person; (not necessarily yourselves) but any reasonable and honest person, acting in good faith, would have felt justified in the comment and criticism.

You are instructed that "if the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged. The fact that the criticism may be fantastic is immaterial, and the extravagant form of its expression is unimportant. It is necessary, however, that the comment have some relation to the facts upon which it is made. If it has not, it may well be taken to imply the existence of other undisclosed defamatory facts."

**Restatement: Torts:**

Sec. 606, p. 277-8.

You are therefore not to attempt to pass on the nature of the comment and criticism alone, but in connection with the facts in the article. A cardinal rule of the law of libel is one which flatly prohibits any attempt to wrench a word or a phrase of an article out of context and base an action thereon. The whole of the article must be considered.

Rose vs. Indianapolis Newspapers, Inc.,  
213 Fed. 2nd p. 227.

#### Instruction No. 14

In this case, the plaintiffs complain that defendant, in the publication of the articles on September 25, 1952, imputed to them the commission of the crime of theft. Defendant denies that any such imputation was intended, and that the articles cannot be so interpreted.

A "crime" is defined in section 65-2-1 ACLA 1949 as follows:

"That a crime or public offense is an act or omission forbidden by law, and punishable, upon conviction, by either of the following punishments:

"First. Death;

"Second. Imprisonment;

"Third. Fine;

"Fourth. Removal from office;

"Fifth. Disqualification to hold and enjoy any office of honor, trust or profit.

"Embezzlement of public money" is defined in section 65-5-63, ACLA, 1949. This section reads:

“That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town or corporation, or in which said Territory, county, town or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be.”

If you find that the section of the code last above set forth, was violated by plaintiffs, it would not matter what defendant intended to impute in this respect, and you must find a verdict for the defendant.

#### Instruction No. 15

In the matter of damages, I instruct you that you should consider this only if you should find that the two articles complained of were libelous; that is, that the comment made on the admitted facts was not fair comment and privileged criticism. If you do find the comment to have been “fair comment” as I have defined that term for you, then there is

nothing further for you to consider, for as I have already instructed you, "fair comment" is not libel.

(Golden North Airways vs. Tanana Pub. Co.,  
supra.)

If the criticism is what is known as "privileged criticism" as herein defined, and there was no malice in the publications, you must find for the defendant.

If, however, you do not first find the comment to have been fair comment, or the criticism to have been privileged under the circumstances, then, and only then should you consider damages.

The plaintiff, Ernest Gruening, in his complaint, alleges that by reason of the public disgrace and injury to his good name, he has been damaged to the extent of \$100,000.00. He seeks the further sum of \$100,000.00 as punitive damages, or what is sometimes called "smart money." This, he seeks by way of punishment of defendant for the publications. The plaintiffs Roden and Metcalf claim that they have each been damaged in the sum of \$100,000.00 on account of the alleged public disgrace and injury to their good names. They do not seek any punitive damages.

It is for you to consider, if you should first find that the publications were not fair comment and privileged criticism, whether either one or all of plaintiffs have been publicly disgraced and their good names injured by the publications; that is to

say, by the opinions of defendant on the established facts.

If you find that no such injury was suffered by Roden or Metcalf, then your verdict on their complaints, must be for the defendant.

In the case of Ernest Gruening, the same instruction applies to his claim for damages on account of public disgrace and injury to his good name.

Punitive damages are allowed only by way of punishment of a wrongdoer. Therefore, if you find that plaintiff, Ernest Gruening, is not entitled to the general damages he claims, or any part of it, and that there was no malice in the publications, that plaintiff is not entitled to punitive damages.

Malice, as I have defined it must be shown by the evidence to exist. It may be established by all the facts and circumstances, but it is never presumed.

“No question of exemplary or punitive damages is involved in an action for libel where there is no evidence of actual malice or a reckless disregard of plaintiff’s rights.”

(News Leader Co. vs. Kocen:

3, S.E. 2nd, 385: 122 A.L.R. 842).

Therefore, you will see that in all cases punitive damages or “smart money” are not to be allowed unless it is first shown that actual damages have been established first, and that the defendant was actuated by malice.

In any event, the burden is on the plaintiffs to prove damages and unless they have shown that they suffered some pecuniary damage or loss, your verdict must be for the defendant regardless of any other consideration.

#### Instruction No. 16

In these cases, as in all trials the plaintiffs have the burden of proving their cases by a preponderance of the evidence: that is to say by the greater weight of the evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

In this connection you are instructed that the burden of proving malice is on the plaintiffs. The defendant is not required to prove absence of malice.

(Curtis Pub. Co. vs. Fraser:  
209 Fed. 2nd, p. 1.)

You will see, therefore, that the burden is on the plaintiffs to prove, by preponderance of evidence, to your satisfaction the material allegations of the complaints before they are entitled to recover anything from the defendant.

Malice has been described as follows:

“The malice which avoids the privilege is actual or express malice, existing as a fact at the time of the communication and which inspired or colored it. Such malice exists where one casts an imputa-

tion which he does not believe to be true or where the communication is actuated by some sinister or cruel motive or motives or personal spite or ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act."

*International & Gnr Co. v. Edmonston,*  
222 S.W. p. 185.

*Johns v. Association Aviation Underwriters,*  
203 F. 2d 208.

In this connection you are instructed that there is no allegation in the complaints that the defendant did not believe the statements published to be true.

The law raises a presumption of good faith on the part of the defendant and even negligence on the part of the defendant cannot take the place of malice. There is neither allegation nor proof that the defendant did not believe the statements which it published to be true, and in the absence of such allegation and proof, no malice can arise in this case.

#### Instruction No. 17

Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence, and the instructions of the court.

You should judge the case solely on the evidence and that alone, and you should not allow your

acquaintance with, friendship for, or hostility to any of the parties, witnesses or attorneys, influence you in deciding any of the questions that will be submitted to you for determination.

#### Instruction No. 18

A witness wilfully false in one part of his testimony may be distrusted in other parts.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

In this connection you are instructed that the plaintiffs have not produced here the records of the Chilkoot Ferry fund transactions. These records should be in the office of the Highway Engineer and all documents, checks, bank statements, and other instruments and papers in writing concerning the bank account which is mentioned in the pleadings herein should be on file in either the office of the Territorial Treasurer or the office of the Highway Engineer. The certificates of these officials and of the Commissioner of Finance, who succeeded to the office of Auditor, have been introduced in evidence showing that no canceled checks are in either of their offices. It was the duty of the plaintiffs to have seen that these checks, other instruments and



bank statements were filed in the proper office and you are instructed that if any person having custody of any public record, book, paper or writing shall wilfully destroy, secrete or mutilate the same, he is guilty of a crime and liable to punishment under the provisions of Section 65-7-21, ACLA 1949.

The plaintiffs were all Territorial officials at the time these records were made and at the time the checks were issued, and it was their duty to produce the records before you or to explain why they were not produced and what disposition was made of them.

Sections 65-7-21-22-23 read as follows:

“65-7-21. Public Records: Destroying, Secretion or Mutliation: Act of Custodian: Act of Attorney. That if any person, having the legal custody of any public record, book, paper, or writing, shall willfully destroy, secrete, or mutilate the same; or if any attorney shall willfully destroy, secrete, or mutilate any such record, book, paper, or writing, or shall wrongfully take the same from the person having the legal custody thereof, or having obtained possession of such record, book, paper, or writing lawfully, shall wrongfully refuse or neglect to return or produce the same when lawfully required or demanded so to do, such person or attorney, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than one year, or by imprisonment in the county jail not less than three months nor

more than one year, or by fine not less than one hundred nor more than five hundred dollars.

“65-7-22. Act of Officer Having Custody. Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the penitentiary not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

“65-7-23. Act of Person Not Officer. Every person not an officer such as referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the penitentiary not to exceed three years, or by a fine not to exceed two thousand dollars, or by both such fine and imprisonment.”

#### Instruction No. 19

You should not consider any evidence sought to be introduced but excluded by the court, nor should you consider any evidence that may have been stricken from the record by the court.

You should consider all the instructions together and not disconnectedly, and you should consider all

the evidence calmly and dispassionately, and not allow any bias in favor of, or prejudice against, any of the parties or witnesses to influence you in your deliberations.

Instruction No. 20

Plaintiffs claim the setting up of the special ferry fund and the disbursement thereof were done for the sake of expediency and convenience.

You are instructed that expediency and convenience are no excuse for violation of the law.

Instruction No. 21

You are instructed that Oscar Olson, the former Territorial Treasurer, was convicted for violation of Sec. 7-1-9 ACLA 1949, which reads as follows:

“If the Treasurer of the Territory of Alaska, or any person exercising the duties of that office, shall fail, neglect or refuse, to account for or pay over, all moneys in his hands as said Treasurer in accordance with law, or shall unlawfully convert to his own use in any manner whatever, or to the use of another not lawfully entitled thereto, or use by way of investment in any kind of property, or loan without authority of law, any portion of the public money intrusted to him for safe keeping, transfer or disbursement, or unlawfully convert to his own use, or to the use of another not entitled thereto, money or other property which may come into his hands by virtue of his office he shall be deemed guilty of the embezzlement of so much of the money

or property as is thus taken, converted, invested, used, loaned, or unaccounted for, and upon conviction thereof he shall be subject to the same punishment as is otherwise provided in the laws of Alaska for the crime of embezzlement.”

He was punished under the provisions of Sec. 65-5-63, which reads:

“That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town, or corporation, or in which said Territory, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be.”

Plaintiffs are charged by defendant with committing acts which parallel the acts of Olson “in the receipt and disbursement of public funds.”

It is not charged that either of plaintiffs had stolen or misappropriated public funds to their

own use. In fact it is not stated that Olson had stolen public funds and the judgment in his case (introduced here), does not so state. It adjudges him guilty of a violation of Sec. 7-1-9, which defines the crime of embezzlement by the Treasurer substantially the same as it is defined in Sec. 65-5-63 for all other persons.

### Instruction No. 22

You are instructed that in all libel actions, the truth of facts published is a complete defense. Motive and purpose are immaterial. If the charges are true, it does not matter whether defendant knew at the time the facts were published they were true, but discovered that afterward, for the truth whenever discovered is a complete defense.

Yankwich, *It's Libel or Contempt If You Print It*, p. 359-60.

### Instruction No. 23

The testimony shows the charge that plaintiff's action in connection with the special ferry fund, paralleled the Olson case in the receipt and disbursement of public funds, is a statement of fact. Defendant claims that the editorial is what is known in the law as "fair comment." Now "fair comment" is essentially opinion based on fact. It must (1) be based on facts truly stated; (2) not contain imputations of corrupt or dishonorable motives on the person whose conduct or work is criticized, save insofar as such imputations are

warranted by the facts; (3) be the honest expression of the writer's real opinion. Fair comment is not libel. Therefore, if you find that the facts set forth in the publications were true or substantially true, and the opinion of the writer was fair comment, your verdict must be for the defendant.

Yankwich Book p. 370-1.

Golden North case, 218 Fed. 2nd p. 627.

The statement in the article complained of that the plaintiffs' action in connection with the special ferry fund paralleled the Olson case in the receipt and disbursement of public funds is a statement of fact. If you find this fact to be true, and the other statements purporting to be facts to be true also, and the opinion or comment contained in the editorial to be fair comment and privileged criticism, your verdict must be for the defendant.

#### Instruction No. 24

We have stated that to constitute "fair comment" the comment or opinion must be based on facts. This rule, "extends, in the absence of malice, to misstatements of fact." Golden North case, p. 630. Therefore, when malice is not shown, if the facts commented upon are substantially true, the right of fair comment is a complete defense.

#### Instruction No. 25

In the letter from Neil Moore, the Auditor, to J. Gerald Williams, the Attorney General, dated Au-

gust 25, 1952, and published by defendant on September 25, 1952, he calls attention to a violation by plaintiffs of certain statutes found in the Alaska Compiled Laws 1949.

However, in 1951, the legislature had passed Chapter 133, Session Laws, 1951. Section 14 of the law reads:

“All receipts from any source whatever shall be forwarded to the Territorial Treasurer each day, or as promptly as practicable, and at the same time, a report of all receipts since the last previous report and of the disposition thereof, shall be submitted to the Commissioner of Finance by the depositing agency. All monies received by the Treasurer during any month shall be credited by him and by the Commissioner of Finance to the proper funds not later than the first day of the following month.”

Section 3 reads:

“The provisions of this Act shall apply to all agencies of the government of the Territory. As used in this Act, the term agency or agencies shall mean and include every department, board, bureau, commission, officer, employee and other instrumentality of the Territory, except municipalities and other political subdivisions of the Territory, with the limitations hereafter provided.”

Section 50 of Chapter 133 reads:

“In case any section, provision or part of this Act or any application thereof shall be declared

invalid, it shall not in any way affect any other section, provision, or part hereof, or any other application hereof.”

These sections of the law above quoted were in force and effect during the entire year 1952 and they were in full force at the time the plaintiffs, acting as the Board of Road Commissioners, set up the special ferry fund and authorized the purser, Robert E. Coughlin, to make payments from this fund. Therefore, the setting up of the fund in the Behrends Bank, and the payments therefrom, were in violation of the laws of Alaska.

#### Instruction No. 26

The statement in the editorial, referring to Oscar Olson sitting in his prison cell dreaming of the days when he thought Territorial laws were only for underlings, is at most an expression of the writer's opinion, and if based on true facts contained in other portions of the publication, it is privileged and not libel.

#### Instruction No. 27

It is admitted that plaintiffs, as Board of Road Commissioners, authorized the handling of the ferry funds in the manner described in the publications complained of. They constituted Robert E. Coughlin purser of the ferryboat Chilkoot, their agent to receive these funds and to disburse them by check without any counter-signature. Therefore, Coughlin became the agent of the plaintiffs and his acts in



the receipt, disbursement and handling of the ferry funds were the acts of plaintiffs.

If an agent is appointed to perform an illegal act, and he does so, the one appointing him is responsible criminally, and, if a tort is committed he is civilly liable.

Restatement: Agency, Vol. 1, Sec. 19.

The possession of the ferry funds by Coughlin was the possession by the plaintiffs. The disbursement of the funds by Coughlin was the same as if it had actually been done personally by plaintiffs. The loss of any portion of the funds would therefore be attributable to plaintiffs.

Instruction No. 28

You are instructed that under the laws of Alaska there existed no authority in 1951 and 1952 for the Territory to operate a ferry; that no appropriation was made by the legislature for the purchase of the Ferry Chilkoot and none was made for its operation and the purchase and operation were therefore without sanction of law. You are instructed that funds of the Territory were used in the purchase of the ferry and Territorial funds were used to pay the deficit from operation. Notwithstanding the fact that there was no authority in law to purchase the ferry, having used Territorial funds for that purpose and having used Territorial funds in the operation of the ferry, all laws applicable to the receipt and disbursement of public funds should have been applied in the handling of these monies.

## Instruction No. 29

To constitute a violation of Sec. 65-5-63 ACLA 1949, it is not necessary that the person charged should have actual physical possession of the money loaned, converted to his own use or not deposited with the Treasurer as directed by law. It is sufficient that he had it in his control.

People v. Knott,  
104 Pac. 2nd 33.

Garner v. State,  
158 So. 546.

State v. Workman,  
114 S.E. 276.

Allred v. United States,  
146 Fed. 2nd 193 (Alaska Case), Ninth  
Circuit.

## Instruction No. 30

The court submits to you certain specific questions which you will be required to answer by your verdict, a form of which is submitted to you. This form of verdict is self explanatory. You will be given these instructions, the pleadings, exhibits and the form of verdict. Upon retiring to the jury room, you will elect one of your number foreman, and he or she will sign the verdict which you must first unanimously agree upon.

A separate form of verdict is given you in each of the three cases. You will first consider the ques-

tion No. 1 in each case and if you answer "Yes" to that question, you need not answer the remaining questions.

[Endorsed]: Filed November 18, 1955.

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[Title of District Court and Cause.]

Nos. 6725-A, 6726-A, 6727-A

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. The oath means that you are not to be swayed by passion, prejudice or sympathy, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court.

On the other hand, it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict,

when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

Jurors are chosen and sworn in civil cases to try issues of fact presented by the allegations of the complaint of the plaintiff and the answers thereto of the defendant.

Three such civil cases have been consolidated for trial in this instance, each of which involves the same issues of fact except as hereinafter noted.

It is admitted by the complaint and answer in each case that the plaintiffs were, at the time of the libel complained of, the Treasurer, Governor, and Highway Engineer of the Territory of Alaska and that under existing Territorial law such three officials constituted what was known as the Territorial Board of Road Commissioners, and as such performed all duties assigned to it by the laws of the Territory. It is further admitted that the defendant was engaged in the printing and publishing business, and was the publisher and proprietor of the newspaper known as the "Daily Alaska Empire," printed and published at Juneau, Alaska, with a daily circulation in said town of Juneau and elsewhere in said Territory and other places.

It is also admitted that before the commission of the acts complained of, the plaintiffs, acting as said

Board and pursuant to law, purchased and acquired for and on behalf of the Territory the "Motor Vessel Chilkoot," and caused the same to be operated in the waters of southeastern Alaska for the transportation of passengers and the carrying of freight, and that the cost and expenses thus incurred were paid in part by the Board out of revenues earned by the vessel.

It is also admitted that before commission of the acts complained of, one Oscar Olson had been the Treasurer of the Territory and that said Olson, upon indictment found by the grand jury for the Territory and his plea of guilty, was convicted of embezzlement of funds and money belonging to the Territory and coming into his possession as the then Treasurer of said Territory and was at all times herein mentioned confined in a penitentiary on McNeil's Island upon his sentence for said offense.

The complaint in each case alleges that on the 25th day of September, 1952, the defendant published in said newspaper certain false, scandalous, defamatory and libelous headlines, articles, and editorial, the complete text of which is offered in evidence as Plaintiff's Exhibit No. 1. Complaint is particularly made as to the following material appearing on the front page of said newspaper:

"Headline:

"Bare 'Special' Ferry Fund

"Sub-headline:

"Reeve Raps Graft, Corruption

“Sub-headline:

“Gruening, Metcalf, Roden, Divert ‘Chilkoot’  
Cash to Private Bank Account

“News Article:

“Entire article appearing two right-hand  
columns, front page, including continuation  
right-hand column, page two.

“Editorial:

“Entire editorial entitled ‘Start Talking,  
Boys’ center front page.”

It is further alleged that said headlines, articles and editorial were maliciously published of and concerning the plaintiffs and were intended to and did expose plaintiffs to the scorn, hatred, and contempt of the general public and residents of Alaska and their friends and neighbors and that the same were intended to convey and did convey the belief that the plaintiffs were dishonest and corrupt and that they were guilty of the crime of embezzlement and of converting funds belonging to the Territory to his or their own use in violation of the law; further, that the libel complained of was the culmination of a campaign of misrepresentation, falsehood and calumny against said officials and was wilfully, wrongfully, and maliciously designed to injure, disgrace and defame plaintiffs and to bring them into public disgrace and contempt.

Each plaintiff alleges that by reason of such false, malicious and defamatory publication he has been publicly disgraced and injured in his good

name, and damaged. Plaintiffs Henry Roden and Frank Metcalf allege such damages in the sum of \$50,000.00 each. Plaintiff Ernest Gruening claims such damage in the sum of \$100,000.00. Plaintiffs Roden and Metcalf also ask for punitive damages in the sum of \$50,000.00 each; and plaintiff Gruening also prays for punitive damages against the defendant in the sum of \$100,000.00.

The defendant in its answer has admitted the publications referred to in their entirety, but denies that any portions of the articles or editorial were false, scandalous, defamatory or libelous. Defendant has also denied that said headline, articles, and editorial were maliciously published or were intended to and did expose plaintiffs to the scorn and hatred or contempt or ridicule of the public or others; and also alleges that the reputations of the plaintiffs have remained the same since the publication of the articles complained of, and hence plaintiffs were not damaged.

The denial of these allegations by the defendant places upon the plaintiffs the burden of proving such allegations by a preponderance of the evidence, except as hereinafter defined.

By way of affirmative defenses to the complaint, defendant alleges in substance:

(1) that the facts stated in the articles complained of are true and correct and that all opinions expressed in setting forth the facts are a fair comment thereon and privileged criticism;

(2) that the matters covered by the publication were matters of public concern, concerning the official acts of Territorial officers who may be up for re-election or reappointment, and that such articles, comments and opinions were justifiable criticisms in the public interest;

(3) that in the same issue of the newspaper and immediately adjoining the article complained of, the defendant published the explanation of the plaintiffs Metcalf and Roden, two members of the said Board, which was published for the purpose of giving to the public such explanation as the members of the Board desired to give regarding the handling of the funds referred to; that at the time of such publication, the Governor was not available for comment; and that there was no malice in the publications complained of:

(4) that on the next day, September 26th, the defendant caused to be published in effect a denial of any accusation against the plaintiffs of embezzlement of public funds, stating that such was not the intention of the article to infer that there had been such misappropriation or theft of funds.

The burden of proving these affirmative allegations by a preponderance of the evidence is upon the defendant.

### No. 3.

You are instructed that any publication of false and unprivileged defamatory printing or writing which tends to expose a person to public hatred,



contempt, or ridicule, or to deprive him of the benefits of public confidence, or to disgrace him, or which tends to injure him in his reputation or business or occupation, when published of him maliciously, constitutes libel.

You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true, would be cause for his removal from office, is actionable per se.

These presumptions of law make it unnecessary for the person to whom the commission of crime is imputed to prove malice or injury; but he may nevertheless make such proof for the purpose of showing the extent or degree of malice and of the injury and damage to his reputation and for the purpose of enhancing his recovery.

However, these presumptions of law, as well as such other proof, may be rebutted by competent evidence; and the defendant may show that there was no malice and that no damage resulted. The burden of proof in this respect is upon the defendant.

In this connection the law makes a distinction between malice in a legal sense, which means a wrongful act done intentionally, without just cause or excuse, and actual malice, which means ill will, enmity, hate, spite, or purpose to injure. The presumption above mentioned refers to legal malice, which need not be proven, whereas actual malice must be proven. In considering the question of legal malice and whether or not the presumption is overcome by evidence you need only consider whether the publication, if false, was made intentionally, without such just cause or excuse. The subject of actual malice, as extending or mitigating the injury, will be discussed hereafter relating to the matter of assessment of damages.

#### No. 4.

You are instructed that the publication complained of, particularly with reference to the words:

“There have been thousands of dollars of illegal receipts and disbursements; the case closely parallels that of Oscar Olson, former Territorial Treasurer, who is now serving a prison term at McNeil’s Island penitentiary for violating the law in the receipt and disbursement of public funds,”

together with other reference to the Olson case, and reference to criminal prosecution, imputes to the plaintiffs the commission of a crime; that is, clearly imputes such without the aid of any extrinsic evidence, and is therefore libelous per se. The legal presumptions of malice and injury above mentioned

must therefore be given effect by you, for it is the exclusive province of the Court to declare to you whether or not such printed matter is as a matter of law libelous per se.

Therefore, unless you find such presumptions overcome by competent evidence, and unless you find by a preponderance of the evidence that such publication was in fact true, or was privileged, as below defined, you must find for the plaintiffs and it will be your province then only to assess the amount of damages which you find the plaintiffs are entitled to recover. If, on the other hand, you find that such statements and imputations were true, or were published without malice, or were privileged, then you must find for the defendant.

The Court does not here declare or intend to indicate to you whether or not the crime charged, imputed to the plaintiffs, or intended to impute to the plaintiffs, the wrongful theft or misappropriation of public funds. The plaintiffs alleged that such words, together with other references to the Oscar Olson case, and imputations of graft and corruption, impute to them the crime of embezzlement as that crime is commonly understood, that is, the wrongful conversion of public funds entrusted to plaintiffs to their own use, which accusation is admittedly untrue. The defendant denies that there was any accusation of theft of public funds, or any such imputation intended, and contends that the violation of law charged referred only to unlawful receipt and disbursement of pub-

lic funds, which it alleges to be true. This is a question of fact for the jury to determine, from a consideration of all of the evidence in the case, and from a careful consideration of the publications in their entirety, including headlines, and any reasonable imputations or deductions arising therefrom.

In this connection, in determining what was meant by the words used in the publication, you will give to such words their commonly accepted meaning or the sense that such words are commonly understood by persons reading them. It is not necessary that such printed words charge the person directly or openly with the commission of any specific crime nor even that the person accused be specifically named if his identity is clear, but it is sufficient if words are printed which in their ordinary accepted meaning impute to such person wrongful theft or conversion to his own use of public funds, or any other crime. The facts reported in the publication as well as the comment thereon, taken in their entirety, should be given full consideration by the jury in determining this question and all other issues of fact as herein defined.

#### No. 5.

The defendant seeks to justify the comparison in the published articles and editorial to the Oscar Olson case, as closely parallel to the case of the plaintiffs, upon information given to the witness Daum, author of the articles and editorial, by Neil F. Moore, Territorial Auditor, to such effect, spe-

cifically referring to the statute defining the crime of embezzlement of public money and fixing the punishment therefore, under which said Oscar Olson was said to have been convicted or sentenced, as applying to the acts of the plaintiffs with respect to the handling of the Chilkoot Ferry fund. The statute referred to, being Sec. 65-5-63, ACLA, 1949, provides in full as follows:

“That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town or corporation, or in which said Territory, county, town or corporation has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded to do so, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be.”

It appears from defendant's Exhibit J, being a certified copy of the judgment and sentence in the Oscar Olson case, that he was convicted under the provisions of Section 7-1-9, ACLA, which particularly defines the crime of embezzlement by the Ter-

ritorial Treasurer. This statute contains language defining such crime in almost identical language to the statute above quoted, but provides that the punishment for such offense shall be the same as is otherwise provided by law for the crime of embezzlement, which refers, as to embezzlement of public money, to Section 65-5-63, quoted above. Therefore Sec. 7-1-9 defined the crime, but Sec. 65-5-63 fixed the punishment, in the Olson case.

You are instructed that in order to constitute the crime of embezzlement of public money upon which a public official may be convicted or sentenced under the provisions of either of these statutes the official accused must either have converted public funds to his own use, or wrongfully loaned such funds, or neglected or refused to pay over any portion of such funds as by law directed. Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds.

You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution. Sections 11-3-8, 12-2-1 and 12-3-1, Compiled Laws of Alaska, referred to in the published letter from Auditor Neil F. Moore to the Attorney General, being a part of Exhibit No. 1, provide for payment of

salaries and expenses of all officers and boards out of appropriations for that purpose, for payment of all fees, licenses, taxes or other money belonging to the Territory to the Treasurer, to be credited by him to the general fund, and for disbursement of public moneys by any disbursing officer of the Territory only upon vouchers certified by the head of the department, which are then referred to the Territorial Auditor for payment. Section 12-2-1 above was repealed by Chap. 133 SLA 1951, known as the "Reorganization Act" which Act, however, contains substantially the same requirements. No penalty is provided for violation of any of these provisions of law; but Section 12-3-3, CLA, provides that the officer or employee approving or certifying a voucher shall be held accountable for and required to make good to the Territory the amount of any illegal, improper, or incorrect payment prohibited by law or which did not represent a legal obligation of the Territory, which liability may be enforced by civil action.

Under the law any taxpayer would also have the right to enjoin any illegal receipt or disbursement of public funds prohibited by these statutes, or to compel any public official to comply therewith, but such does not make any such violation or failure to comply with such statutes a crime, that is, punishable by fine or imprisonment, or removal or disqualification from office.

By this the Court does not intend to comment in any way as to whether or not the actions of the

plaintiffs relating to the "Chilkoot" ferry fund were or were not illegal, which is a matter for the jury; but it is the intention of this instruction only to declare to you the remedy in case there may exist any such illegality.

You are therefore instructed that unless you find from the evidence that the facts reported in the news articles were sufficient to constitute the crime of embezzlement as above defined, no defense as to the justification of truth of the alleged libelous publication, which imputes the commission of a crime or criminal liability, may be based upon the construction of these statutes. There remains to be considered by you the question of whether or not, as contended by the defendant, the "device" used by the plaintiffs as members of the Board in depositing the funds from the operation of the ferry in a special account rather than paying such to the Territorial Treasurer, and in paying operating expenses of the ferry from such account, is a sufficient parallel with the case of Oscar Olson in setting up a special account as shown by the evidence to justify the publication as true. This is a question of fact for the jury to determine from a consideration of all of the evidence in the case.

#### No. 6.

You are further instructed that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defend-



ant must show, to justify the truth of such publication, not only that plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use. In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or to deprive the Territory thereof.

No. 7.

During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry "Chilkoot," by the purser.

You are instructed to disregard all of such testimony as it is not relevant to the issues involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication.

## No. 8.

The truth of the words complained of is an absolute defense to an action for libel. If you should find that the words which the defendant used concerning plaintiffs were true in the ordinary acceptance of the meaning of such words, the plaintiffs are not entitled to recover. To be available as such a defense the justification of truth must extend not only to the entire language complained of, but must show the truth of the publication in the sense imputed to it. A mere belief on the part of the defendant of the truth of the publication is not a defense. Accordingly, even though a publication purports to be made on information given by another, such justification must establish the truth of the charge and not merely the defendant's belief that it was true.

The law with respect to privileged publications relates to those wherein the author or publisher acted in the bona fide discharge of a public or private duty, or in the public interest. Every citizen and every newspaper has the right to call to the attention of fellow citizens any maladministration of public affairs or the misconduct of a public officer if the real motive in so doing is to bring about reform of abuses, or defeat the re-election or reappointment of an incompetent officer; hence, publications dealing with political matters and public officers are entitled to a reasonable measure of privilege by reason of the public interest involved therein, as matters of public interest and concern are legitimate subjects of criticism as long as such

criticism is made fairly and with an honest purpose. The limitations upon this rule are that the statements published must be within the bounds of fair comment and honestly made, and must not be motivated by actual malice. Accusations of crime, fraud, or corruption are not privileged unless true. Other criticism of public officers published in good faith and without malice are privileged except that such privilege does not extend to misstatements of fact, and any defamatory publication is actionable if false, regardless of the question of good faith or reasonable belief.

A retraction of libelous words is not a defense to an action for the defamation unless retracted at the time of the publication or as a part of the same publication; hence any retraction published at a later date would not be a defense, although such may be considered by the jury in the matter of mitigation of damages. The publication of statements made by two of the plaintiffs simultaneously with the publication of the matter complained of would not constitute such a retraction unless by the same publication the defendant acknowledged the truth of the statements or explanations made.

The publication of the editorial under date of September 26, 1952, under the heading "Attention" was published, according to the evidence of the defendant, not as a retraction but as an explanation to show that there was no intention to charge the plaintiffs with the theft of public funds. This statement, then, need not be considered by you as a

retraction, which must be full and without reservation, but should be considered by the jury in the matter of mitigation of damages and as bearing upon the question of malice; in other words, whether such publication may reduce or minimize the amount of damages which the plaintiffs may otherwise have suffered.

If you find that the publication was defamatory and libelous and find that it was not true or privileged, then you should consider the matter of damages.

#### No. 9.

The plaintiffs in each case seek compensatory and punitive damages. The former are intended to compensate for the injury caused and the latter are allowed by way of punishment and to deter the repetition of the wrong or the commission of such wrong by others.

As to compensatory damages, you are instructed that the defendant may be held liable for all damages which were the natural and probable result of the publication of the statements referred to. In this connection, no actual monetary loss need be shown, as general damages presumed from the publication of libelous matter, while not susceptible of being actually measured by dollars and cents, may or may not be found to be substantial and real. You should consider the actual or probable effect of the publication upon the plaintiffs' personal feelings and their standing and reputation both as a

private person and as a public official in the community in which they live and in the territory in which the Daily Alaska Empire is circulated; and the extent of such injury, if any, to such standing and reputation. You may also take into consideration mental anguish and suffering, if any, directly caused by the publication of the statements and imputations referred to; whether the defendant was actuated by actual malice or intent to injure the plaintiffs in making the publication, and whether as a direct result thereof, the plaintiffs were exposed to hatred, contempt, ridicule, or public disgrace; and you may award each of them damages in such sum, not exceeding the amount asked for, as in your judgment will fairly compensate each of them for any such injury or damage to his or their name and reputation. If you find that there has been no such substantial injury or damage, then the damages awarded should be nominal only. The term "nominal damages" means damages in a small or nominal amount only, for the purpose of vindication, where a legal right has been shown to have been violated but no substantial damage has been proven to have been sustained by the plaintiffs.

As to exemplary or punitive damages, you are instructed that if you find from a preponderance of the evidence that the articles and editorial were published recklessly, wantonly, out of spite or ill will, or with utter disregard for the rights of the plaintiffs, you may also award each of them such further sum, not exceeding the amount asked for,

by way of exemplary or punitive damages as in your judgment you believe should be fairly assessed against the defendant. Exemplary or punitive damages may be allowed even though no compensatory damages are allowed. However, you are not obliged to allow the plaintiffs any sum by way of exemplary or punitive damages, which is a matter committed to your discretion by law; and if you find that the defendant honestly believed in the truth of the matter published and published such in good faith, without actual malice, you may take such into consideration in determining whether the plaintiffs are entitled to exemplary or punitive damages and the amount thereof.

You are further instructed that both compensatory damages and punitive damages must be considered by you separately as to each of the plaintiffs. In each case any award which you make for compensatory damages need have no relationship to any amount you may award for punitive damages.

In determining whether the defendant was actuated by actual malice you should consider the publications in their entirety, together with the facts and circumstances leading up to and attending the writing and publishing of the articles; the attitude of the defendant toward the plaintiffs; the motive, if any, shown for the publication; and whether the defendant was actuated by ill will, enmity, hatred or a desire to injure the plaintiffs in their fame or

reputation, or to degrade or disgrace them, and whether the defendant, its reporters, editors, or manager in good faith considered such publications to be fair comment and privileged.

No. 10.

You must consider the parties to this case as though they were all individual persons. A corporation is entitled to receive the same fair and unprejudiced treatment in a court of law which an individual would be entitled to receive under like circumstances.

A corporation is liable for the acts of its agents or employees authorized to act on its behalf, that is, a corporation can only act through its officers and agents, and is responsible for any wilful, malicious, wanton or reckless acts of its officers, agents, or employees done within the scope of their employment; hence the acts, conduct and motives of any such employee, acting within the scope of his employment, are to be considered as the acts, conduct and motives of the defendant corporation.

No. 11.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the

greater weight and value and the greater convincing power, or, in other words, such evidence, as when weighed with that opposed to it, has more convincing force and produces in the minds of the jurors conviction of the greater probability of truth, after they have considered all of the evidence in the case.

Any testimony offered by either party and rejected by the Court, and any testimony ordered stricken by the Court, should not be considered by the jury for any purpose.

No. 12.

Subject to the law as contained in these instructions, you are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. Evidence includes not only all the facts testified to or established by the exhibits, but also all reasonable inferences which may be deduced therefrom. What facts have been proved and what inferences may be deduced therefrom is for you to determine. When the parties testify on their own behalf they are deemed witnesses, and their testimony is to be weighed and their credibility determined in the same manner as other witnesses.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it



is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses, but that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he has to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your

judgment, to speak the truth or otherwise as to matters within his knowledge.

A witness wilfully false in one part of his testimony may be distrusted in others.

#### No. 13.

You must not allow sympathy or prejudice to influence your verdict. Sympathy for the injuries of the plaintiffs, or for the owners of the defendant corporation, if any, should not influence you in determining whether or not the defendant is liable, or if liable, affect in any way the amount of your verdict. Your verdict should be entirely free from the effect of sympathy, compassion or prejudice.

#### No. 14.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded.

## No. 15.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

Finally, while you are not justified in departing from the evidence or the rules of law as stated by the Court, you may, in determining any question applying to the facts of this case, resort to the common sense and experience in the affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

## No. 16.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in

considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

#### No. 17.

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with the exhibits, and six forms of verdict, two in each of the three consolidated cases, which must be considered separately. In each case, if you find in favor of the plaintiff you will have your foreman date and sign Verdict No. 1 after first inserting therein the amount of damages, both compensatory and punitive, which you find the plaintiff is entitled to recover. In each case, if you find in favor of the defendant you will have your foreman date and sign Verdict No. 2. Such verdicts, when completed and signed, should then be returned by you into Court as your verdict

in each case, together with the forms of verdict not used by you, the exhibits, and these instructions.

If you agree upon a verdict during Court hours, that is between 9 a.m. and 11:00 p.m., you should have your foreman date and sign it and then return it immediately into open Court in the presence of the entire jury, together with the exhibits and these instructions, and the unused forms of verdict. If, however, you do not agree upon a verdict during such hours, the verdict, after being similarly dated and signed, must be sealed in the envelopes accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the Court next convenes at 10 a.m., Monday, when the verdict will be received from you in the usual way.

Given at Ketchikan, Alaska, this 19th day of November, 1955.

/s/ WALTER H. HODGE,  
District Judge.

[Endorsed]: Filed November 21, 1955.

In the United States District Court for the District  
of Alaska, Division Number One, at Ketchikan

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,

Defendant.

VERDICT No. 1

We, the jury, duly impanelled and sworn to try the above-entitled cause, find in favor of the plaintiff and against the defendant; and further find as follows:

1. That the plaintiff is entitled to recover from the defendant compensatory damages in the sum of \$1.00.

2. That the plaintiff is entitled to recover from the defendant punitive damages in the sum of \$5,000.00.

Dated at Ketchikan, Alaska, this 20th day of November, 1955.

/s/ TOM W. GAFFNEY, JR,  
Foreman.

[Endorsed]: Filed November 21, 1955.

[Title of District Court and Cause.]

VERDICT No. 1  
6726-A

We, the jury, duly impanelled and sworn to try the above-entitled cause, find in favor of the plaintiff and against the defendant; and further find as follows:

1. That the plaintiff is entitled to recover from the defendant compensatory damages in the sum of \$1.00.

2. That the plaintiff is entitled to recover from the defendant punitive damages in the sum of \$5,000.00.

Dated at Ketchikan, Alaska, this 20th day of November, 1955.

/s/ TOM W. GAFFNEY, JR.,  
Foreman.

[Endorsed]: Filed November 21, 1955.

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[Title of District Court and Cause.]

No. 6727-A

VERDICT No. 1

We, the jury, duly impanelled and sworn to try the above-entitled cause, find in favor of the plaintiff and against the defendant; and further find as follows:

1. That the plaintiff is entitled to recover from the defendant compensatory damages in the sum of \$1.00.

2. That the plaintiff is entitled to recover from the defendant punitive damages in the sum of \$5,000.00

Dated at Ketchikan, Alaska, this 20th day of November, 1955.

/s/ TOM W. GAFFNEY, JR.,  
Foreman.

[Endorsed]: Filed November 21, 1955.

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[Title of District Court and Cause.]

Nos. 6725-6726-6727A

OBJECTIONS OF DEFENDANT TO PROPOSED JUDGMENT FOR COSTS AND ATTORNEYS' FEES, AND REQUEST FOR REDUCTION OF JURY'S AWARD

Comes now the defendant by its attorneys H. L. Faulkner and Roger G. Connor, and objects to the entry of any judgment for costs and attorneys' fees to the plaintiffs, upon grounds as follows:

Costs and attorneys' fees are subject to the discretion of the Court, and the District Court for the First Judicial Division has heretofore never hesitated to exercise that discretion, and, taking into



consideration the circumstances of the case, has frequently denied both costs and attorneys' fees.

The verdict for compensatory damages was One Dollar to each of the plaintiffs, or a total of Three Dollars. Under the law this alone would not entitle the plaintiffs to costs. The verdict for punitive damages of Five Thousand Dollars to each plaintiff, or a total of Fifteen Thousand Dollars is out of proportion to the amount awarded as compensatory damages. Formerly it was the rule that punitive damages, awarded as punishment of defendant in libel cases could not exceed the amount awarded as compensatory damages. We concede that this has been changed and punitive damages may exceed the compensatory damages awarded, but still the matter of costs and attorneys' fees are left to the discretion of the Court, and we respectfully submit that this should be an additional reason for the exercise of that discretion notwithstanding the change in the rule above mentioned.

By awarding each plaintiff Five Thousand Dollars as punitive damages with only nominal damages to each, it would appear that the jury may well have made that award to the plaintiffs for the purpose of defraying their expenses of the trial of the action and preparing therefor.

The general rule, expressed in practically all libel suit decisions, is that in libel suits, while the jury may assess both general or compensatory damages and punitive damages, still the Court always exercises discretion as to the amount of the award.

Judge Yankwich states in his book "It's Libel Or Contempt If You Print It" at page 349:

"Although the plaintiff may claim both compensatory and exemplary damages, if the jury should award exemplary damages without awarding compensatory damages, the verdict could not stand. Rightly. For a failure to award general damages indicates that the publication has not injured the plaintiff, because the truth has been established. Exemplary damages merely enhance the tort. (Emphasis supplied.)

The verdict of the jury in this case indicates that the plaintiffs suffered no actual damage by the publication complained of, for they were awarded only nominal damages. To assess \$15,000.00 punitive damages on the \$3.00 nominal damages, and costs and attorneys' fees in addition to that, would seem to be grossly excessive.

Defendant objects to the entry of a judgment for punitive damages in any sum not commensurate with the amounts of the verdicts for general or compensatory damages.

The whole matter is within the jurisdiction of the Court; that is, whether the punitive damages awarded by the jury are excessive when taken into consideration with the verdict for general damages, and, whether, under all the circumstances of the case, any costs or attorneys' fees should be allowed.

Submitted without argument this 25th day of November, 1955.

/s/ H. L. FAULKNER,

/s/ ROGER G. CONNOR,

Attorneys for Defendant.

[Endorsed]: Filed November 27, 1955.

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[Title of District Court and Cause.]

Nos. 6725-A, 6726-A, 6727-A

DEFENDANT'S MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICTS,  
OR FOR A NEW TRIAL

This motion is filed pursuant to the provisions of Rules 50 and 59 of the Federal Rules of Civil Procedure. Defendant moves the Court to set aside the verdicts of the jury in these consolidated cases and in each case and to enter judgment herein for the defendant. This motion is based upon the grounds presented to the Court and urged by defendant in its motion for directed verdicts made and filed at the conclusion of the introduction of testimony in these cases.

If the Court should deny the relief sought hereinabove and should refuse to enter judgment for defendant notwithstanding the verdicts, then, in order to avoid a waiver of the right to request a new trial within the ten days prescribed by Rule 59(b), de-

pendant now moves the Court for a new trial upon the following grounds:

(a) The Court erred in holding that since Section 12-2-1, ACLA 1949, did not provide any criminal penalty for its violation and that therefore plaintiffs could not lawfully have been charged with any criminal acts for violation of that section, no testimony could be introduced to show that any loss of funds occurred through plaintiffs' violation of Section 12-2-1 which would result in a violation of Section 65-5-63, ACLA, 1949.

(b) The Court erred in rejecting the testimony of Steve Homer under defendant's offer of proof and which testimony was offered to show a loss of public funds resulting from violation by plaintiffs of Section 12-2-1, ACLA, 1949, and of other testimony of defendant tending to support the testimony of Steve Homer.

(c) The Court erred in holding that an agent's criminal acts cannot be imputed to the principal even where the agent is appointed to perform an illegal act. (In this case the plaintiffs admitted that they violated Section 12-2-1, ACLA, 1949, and defendant offered to show a loss of public funds resulting from this violation of the law and that loss of public funds was a violation of Section 65-5-63, ACLA, 1949.

(d) The Court erred in holding that the violation by plaintiffs of Section 12-2-1, ACLA, 1949, was not also a violation of Section 65-5-63, ACLA, 1949.

(e) The Court erred in instructing the jury that the articles published by defendant, which are the basis of this action, constituted libel per se.

(f) The Court erred in holding that the canceled checks issued on the special ferry fund were immaterial and that the loss was immaterial in these cases.

(g) The Court erred in holding that bank deposits and checking accounts do not constitute a loan, creating the relationship of debtor and creditor between the bank and the depositor.

(h) The Court erred in admitting in evidence, over the objection of defendant, a printed copy of a letter purporting to have been written by Fred McGinnis. (Plaintiff's Ex. No. 8.)

(i) The Court erred in giving Instruction No. 6 and particularly that portion of it which reads:

“the defendant must show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use.”

(j) The Court erred in giving Instruction No. 7 wherein the Court instructed the jury to disregard all testimony of a shortage of money in the handling of the public funds involved in this case and which instruction is based on the fact that the defendant did not mention a shortage of funds in the publication of September 25, 1952, and that therefore the

loss of public funds was not an issue in the case and was not relevant to the truth or falsity of the publication and in this connection defendant proposed Instruction No. 22 to the effect that the truth, whenever discovered, is a complete defense in a libel action, and it was an error to deny that instruction. (No. 8.)

(k) The Court erred in giving to the jury the first paragraph of Instruction No. 4 beginning on line 2 and ending on line 16 of the first page of that instruction.

(l) The Court erred in giving that portion of Instruction No. 5 which reads as follows:

“You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution,”

because Section 65-5-63 does make such violation of the law a crime and subject to criminal prosecution and imprisonment and this involves the same statute as the one under which Oscar Olson was sentenced.

(m) The Court erred in giving the first paragraph of Instruction No. 8 for the reason that the rejection of the testimony offered to show loss of public funds made it impossible for defendant to es-

establish in detail the truth of the charge and the close parallel of the case to that of Osear Olson.

(n) The Court erred in giving the instruction to the jury contained in the second paragraph on page 2 of Instruction No. 8 which is on page 17 of the instructions as a whole. This is the instruction regarding retraction as there is no retraction involved in this case.

(o) The Court erred in refusing to give defendant's proposed Instructions No. 30, No. 4, No. 5, No. 6, No. 7, No. 8, the last paragraph of Instruction No. 9, and No. 10.

(p) The Court erred in refusing to give defendant's proposed Instruction No. 11 with the exception of that portion which the Court did give to the effect that what one may lawfully speak, he may lawfully write and publish.

(q) The Court erred in refusing to give defendant's proposed Instructions No. 13, No. 14, No. 16, No. 18, No. 20, No. 22, No. 23, No. 24, No. 26, No. 27, No. 28, and No. 29.

(r) The Court erred in refusing to submit to the jury the specific questions requested by defendant in order to constitute special verdicts. This objection is particularly pertinent because of the nature of the verdicts found in that each is a \$1.00 general or compensatory damage to each plaintiff and \$5,000.00 to each as punitive damages. The general damages were nothing more than what is known as

nominal damages and the jury should have been permitted to find specifically whether there was malice as defined in the case of *Coleman v. McLennon*, 98 Pac. 281. It is impossible to tell from the general verdicts submitted and returned whether the jury based its award of punitive damages on malice as defined by the Court and the law.

(s) If any judgment shall have been entered before a consideration of this motion upon the verdicts of the jury rendered and filed in open Court on November 21, 1955, the defendant moves the Court to open and set aside the judgment entered herein and to either enter judgment for the defendant or to grant the defendant a new trial upon the grounds herein set forth.

Dated at Juneau, Alaska, this 25th day of November, 1955.

/s/ H. L. FAULKNER,

/s/ ROGER G. CONNOR,

Attorneys for Defendant.

Affidavit of mail attached.

[Endorsed]: Filed November 28, 1955.



[Title of District Court and Cause.]

Nos. 6725-A, 6726-A, 6727-A

ORDER DENYING DEFENDANT'S MOTION  
FOR JUDGMENT NOTWITHSTANDING  
THE VERDICTS, OR FOR A NEW TRIAL

The above-entitled consolidated cases having come on regularly for trial before the above-entitled Court and a jury on November 14th to November 19th, 1955, and the jury having rendered a verdict in each case in favor of the plaintiff and against the defendant awarding to the plaintiff the sum of \$1.00 as compensatory damages and the sum of \$5,000.00 as punitive damages; and the defendant having presented and filed herein its motion to set aside the verdicts of the jury and to enter judgment for the defendant in each case, or, if such relief be denied, to order a new trial, specifying 18 assignments of error; and such motion having been submitted without argument; and the Court having considered each of such assignments of error and the reply of the plaintiffs thereto, and being fully advised in the premises; it is therefore Ordered as follows:

Paragraphs (a) and (b) of the assignments of error are overruled for the reasons stated by the Court during the progress of the trial and for the further reason that no testimony was offered by the defendant to show any loss of funds occurring through plaintiffs' violation of Sec. 12-2-1 which

could result in a violation of Sec. 65-5-63, ACLA, 1949, but the only evidence offered along this line purported to show a shortage of funds occurring in the hands of Robert Coughlin, purser of the ferry "Chilkoot," alleged to have been discovered subsequent to the publication complained of, on which grounds the ruling of the Court was based.

Paragraph (c) is overruled for the reason stated by the Court during the progress of the trial and for the further reason that the Court did not hold that "an agent's criminal acts cannot be imputed to the principal even when the agent is appointed to perform an illegal act," but held instead that the plaintiffs as principals could not be held criminally liable for any shortage of funds occurring in the hands of the purser unless they be accessories thereto; and for the further reason that plaintiffs did not admit at the trial that they had violated Sec. 12-2-1, ACLA, 1949, but denied such violation and alleged that they had handled the moneys in the "Chilkoot" ferry fund in accordance with a previous opinion of the Attorney General of the Territory; and that the Court did not hold that any loss of public funds by embezzlement thereof was not a violation of Sec. 65-5-63.

Paragraphs (d) to (r) inclusive, are overruled for the reasons assigned by the Court during the progress of the trial and for the further reason the Court's Instruction No. 8 fully covered the issue of truth of the words complained of as a defense to an action of libel and that the instructions given to

the jury and the refusal of defendant's requested instructions in no wise made it impossible for defendant to establish the truth of the charge set forth in the publication.

Finding no merit in the errors complained of and finding that the defendant received a fair and impartial trial as to all pertinent issues raised by the pleadings in such case, the Motion for Judgment Notwithstanding Verdict and the Motion for New Trial are denied.

Judgment is entered accordingly and in accordance with the Opinion of the Court rendered December 2, 1955, upon previous objections of the defendant to the proposed judgment.

Dated and entered at Ketchikan, Alaska, this 7th day of December, 1955.

/s/ WALTER H. HODGE,  
District Judge.

[Endorsed]: Filed December 7, 1955.

In the District Court for the District of Alaska  
Division Number One, at Ketchikan

No. 6725-A, 6726-A, 6727-A  
Consolidated cases for trial.

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

### JUDGMENT

The above consolidated cases came on for trial commencing November 14, 1955, before the Honorable Walter H. Hodge, District Judge, sitting at Ketchikan, Alaska, and trial ending on November 19, 1955, the plaintiffs being present in person and represented by Wendell P. Kay and Buell A. Nes-

bett, their attorneys, and the defendant being represented by Wendell P. Kay and Buell A. Nesby H. L. Faulkner, its attorney; a jury of twelve (12) persons was regularly impaneled and sworn to try the causes and oral testimony and documentary proof having been introduced and admitted on behalf of both parties, whereupon the Court instructed the jury on the law in the matters and counsel for both sides having argued the matter to the jury the jury thereupon retired to consider their verdict. Thereafter and at ten o'clock a.m. on the 21st day of November, 1955, the jury returned into court with verdicts in each case which were unsealed in open court and in the presence of the jury and found to be verdicts in favor of the plaintiffs in each of the cases reading as follows:

\* \* \*

[The Verdicts read herewith are set out in full, pages 118 to 120 of this printed record.]

Wherefore by virtue of the law and by reason of the premises aforesaid it is hereby

Ordered, Adjudged and Decreed that judgment be and is hereby given in favor of each of the plaintiffs above named in the sum of Five Thousand One Dollars (\$5,001.00) and that plaintiffs shall have and recover from the defendant plaintiffs' costs and disbursements in this action incurred to be taxed by the Clerk of the Court in the manner provided by law and attorneys fees in the sum of \$1,000.00.

Dated at Ketchikan, Alaska, this 7th day of December, 1955.

/s/ WALTER H. HODGE,  
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 7, 1955.

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[Title of District Court and Cause.]

No. 6725-A, 6726-A, 6727-A

#### NOTICE OF APPEAL

Notice is Given that the Empire Printing Company, defendant above named, appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of December, 1955, and from the whole thereof.

Dated at Juneau, Alaska, this 8th day of December, 1955.

/s/ H. L. FAULKNER,

/s/ ROGER G. CONNOR,

Attorneys for Defendant.

Supersedeas and cost bond fixed at \$25,000.00.  
December 9, 1955.

/s/ WALTER H. HODGE,  
Judge.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Cause.]

No. 6725-A, 6726-A, 6727-A  
Consolidated Cases

SUPERSEDEAS BOND AND  
COST BOND ON APPEAL

Whereas, the above-named appellant, Empire Printing Company, a Corporation, has appealed, or is about to appeal, to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered, or to be entered hereafter, in the above-entitled causes, which were consolidated, on the 28th day of September, 1954, and from the whole thereof, and from the court's order denying appellant's motion for judgment notwithstanding the verdicts, or for a new trial, and which order overruling appellant's motion is dated before the entry of the judgment, and which judgment hereinabove mentioned is in favor of appellees and against the appellant; and,

Whereas, appellant is desirous of staying the execution of the judgment aforesaid pending the appeal and final determination thereof, and the appellant has agreed that the penal amount of the supersedeas and cost bond shall be \$25,000.00,

Now, Therefore, in consideration of the premises and of the appeal, we, the undersigned, Empire Printing Company, a corporation, as principal, and Helen T. Monsen, of Juneau, Alaska, and William Prescott Allen, of Juneau, Alaska, as sureties, do

hereby jointly and severally undertake and promise and acknowledge ourselves, our successors, executors and administrators, bound in the sum of \$25,000.00, that appellant Empire Printing Company, a corporation, will satisfy the judgment in full, together with all costs, interests and damages for delay and costs of appeal, if for any reason the appeal is dismissed, or if the judgment is affirmed, and will satisfy in full such modification of the judgment and such costs, interests and damages as the appellate court may adjudge and award, including costs on appeal. This obligation is binding upon the successors, executors and administrators of the principal and sureties hereto and it shall be in favor of the several appellees, their heirs, executors, administrators and assigns.

In Witness Whereof, the Empire Printing Company, as principal, has caused this bond to be executed and the sureties have signed their names thereto, all on this 7th day of December, 1955.

[Seal]

EMPIRE PRINTING  
COMPANY,

By /s/ HELEN T. MONSEN,  
President.

Attest:

/s/ N. C. BANFIELD,  
Secretary,  
Principal.

/s/ HELEN T. MONSEN,

/s/ WILLIAM PRESCOTT ALLEN,  
Sureties.



Executed in the Presence of:

/s/ H. L. FAULKNER,

/s/ LILA FOSTER.

United States of America,  
Territory of Alaska—ss.

Acknowledged before me this 7th day of December, 1955, at Juneau, Alaska, by Helen T. Monsen and N. C. Banfield, as president and secretary, respectively, of the above-named Empire Printing Company, a corporation, as its free and voluntary act and deed.

Witness my hand and official seal the day and year hereinabove first written.

[Seal]: /s/ KATHRYN ADAMS,  
Notary Public for Alaska.

My commission expires: May 15, 1956.

United States of America,  
Territory of Alaska—ss.

This certifies that on this 7th day of December, 1955, at Juneau, Alaska, before me, the undersigned, a Notary Public for Alaska, duly commissioned and sworn, personally appeared the above named Helen T. Monsen and William Prescott Allen, the sureties who executed the foregoing bond and each

acknowledged to me that he and she are residents of the Territory of Alaska, owners of property therein, and that they are each worth more than the sum of \$25,000.00 over and above all debts and liabilities, exclusive of property exempt from execution, and that neither of them is an attorney, counsellor at law, marshal, deputy marshal, clerk of any court, or other officer of any court, and that they are qualified in every respect to be sureties on the foregoing bond.

Witness my hand and seal on the day and year herein first above written.

[Seal]        /s/ KATHRYN ADAMS,  
Notary Public for Alaska.

My commission expires: May 15, 1956.

Approved and appeal allowed this 9th day of December, 1955.

      /s/ WALTER H. HODGE,  
Judge of the District Court, Territory of Alaska,  
Division Number One.

United States of America,  
Territory of Alaska—ss.

We, the undersigned, Helen T. Monsen and William Prescott Allen, the sureties named in the foregoing bond, being first severally duly sworn, depose and say:

That we are both residents of the Territory of Alaska and property owners therein, and that we are each worth the sum of more than Twenty-Five Thousand (\$25,000) Dollars over and above all our just debts and liabilities and exclusive of property exempt from execution, and that neither of us is a marshal, deputy marshal, clerk of any court, or any officer of any court, and that we are qualified in all respects to be sureties on the foregoing bond.

/s/ HELEN T. MONSEN,

/s/ WILLIAM PRESCOTT ALLEN.

Subscribed and sworn to before me this 7th day of December, 1955.

[Seal]      /s/ KATHRYN ADAMS,  
Notary Public for Alaska.

My commission expires: May 15, 1956.

[Endorsed]: Filed December 9, 1955.

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[Title of District Court and Causes.]

Nos. 6725-A, 6726-A, 6727-A

ORDER EXTENDING TIME TO PREPARE  
AND FILE TRANSCRIPT AND TO PER-  
FECT APPEAL

This Matter having come on before the court upon motion of the defendant for extension of time of an additional fifty (50) days within which

to file a transcript of record, defendant's designation of record on appeal, and defendant's statement of points to be relied upon on appeal, and it appearing to the court that the transcript of record cannot be completed by the court reporter and filed within the time specified in the rules,

Now, Therefore, it is hereby ordered that the defendant be and it is hereby granted until the 8th day of March, 1956, within which to file herein the transcript of record on appeal, the designation of record on appeal, and the statement of points to be relied upon by defendant on appeal to the United States Court of Appeals for the Ninth Circuit.

Done in Open Court this 20th day of December, 1955.

/s/ WALTER H. HODGE,  
Judge.

Affidavit of Mail attached.

[Endorsed]: Filed December 20, 1955.

In the U. S. District Court for the District of  
Alaska, Division Number One, at Juneau

No. 6725-A

HENRY RODEN,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

No. 6726-A

ERNEST GRUENING,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

No. 6727-A

FRANK A. METCALF,

Plaintiff,

vs.

EMPIRE PRINTING COMPANY, a Corporation,  
Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 14th day of No-  
vember, 1955, Court having convened at 10:00  
o'clock a.m., at Ketchikan, Alaska, the above-  
entitled causes, having previously been consolidated  
for trial, came on for trial before a jury; the Hon-

orable Walter H. Hodge, United States District Judge, presiding; the plaintiffs appearing by Wendell P. Kay and Buell A. Nesbett, of their attorneys; the defendant appearing by H. L. Faulkner, its attorney; respective counsel having announced they were ready for trial, empanelling of a jury was commenced.

Court recessed until 2:00 o'clock p.m., November 14, 1955, reconvening as per recess, with all parties present as heretofore, and empanelling of a jury was completed and the jury was sworn to try the causes; whereupon, the jury was duly admonished by the Court; respective counsel stipulated that, should it become necessary to excuse any member of the jury during the trial of the causes, they would proceed with less than twelve jurors;

Court adjourned until 10:00 o'clock a.m., November 15, 1955, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; opening statements were made by respective counsel; whereupon, the jury was excused, and Court and counsel discussed some matters of law; whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; upon plaintiffs' motion the Court excluded from the courtroom all witnesses, [2\*] other than the parties and Mrs. Helen Monsen, president of the defendant company; whereupon the following proceedings were had:

The Court: You may proceed.

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

PLAINTIFFS' CASE

ERNEST GRUENING

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Will you state your name, please?

A. Ernest Gruening.

Q. Will you state where your residence is, sir?

A. My residence is twenty-four miles north of Juneau at Eagle River Landing.

Q. And what is your present occupation, business or occupation, sir?

A. I am a writer and lecturer.

Q. Governor Gruening, you are a former Governor of the Territory of Alaska, are you not, sir?

A. That is correct.

Q. And when were you first appointed as Governor of the Territory?

A. In December of 1939. I took office on December 6th.

Q. Because it is relevant in the case on trial, Governor, [3] I am going to ask you briefly to give the Court and jury a short biographical sketch of your background prior to your appointment as Governor of the Territory, if you will do that, sir.

A. How far back shall I go?

Q. Well, start with your first job or education, sir, and bring it down briefly.

A. After graduating from school and college and

(Testimony of Ernest Gruening.)

professional school, I decided to go into newspaper work, and I started in as a reporter on a Boston newspaper, and I served as a reporter on that and other papers and gradually went through the other stages of newspaper work, copy desk editing, re-writing, and then became city editor and managing editor of a Boston paper, and in the subsequent years my vocation was that of a newspaperman, and I was the editor of various newspapers—the Boston Traveler, the Boston Journal, the New York Post, the New York Tribune—and the New York Nation, a weekly magazine. And in the course of my journalism I became very much interested in our relations with Latin America and wrote a good deal on the subject, got a leave of absence to go to Mexico to write some articles for Collier's Magazine and other magazines, and, when I came back, decided to write a book on Mexico, which was published in 1928, and, largely as a result of that and my interest in Latin [4] America, I was appointed the adviser to the United States Delegation at the Seventh Inter-American Conference, usually known as the Pan-American Conference, which met in 1933, and where we established what has become since known as the Good Neighbor Policy, which I had advocated. And, I think, because my services were deemed satisfactory, I was then appointed to a new position which had been created, that of Director of the Division of Territories and Island Possessions in the Department of the Interior, which had supervision over the Federal relations of our terri-



(Testimony of Ernest Gruening.)

tories and island possessions—Alaska, Hawaii, Puerto Rico, the Virgin Islands, and later, until they were given their independence, the Philippines, and several lesser islands, including the United States Antarctic Service, and I served there for five years when the governorship of Alaska became vacant, and during those five years as Director of Territories, I paid two visits to Alaska and had become somewhat familiar with its problems. At that time President Roosevelt asked me to serve as Governor, and that is how I came to be appointed.

Q. Who was your predecessor, sir, as Governor of Alaska?      A. John Weir Troy.

Q. Now, Governor, after your appointment by President Roosevelt were you confirmed by the United States Senate? [5]      A. Yes, I was.

Q. Was that confirmation unanimous?

A. I was confirmed three times, at the end of each four-year term; the terms are four years each; and I was confirmed each time by unanimous vote of the United States Senate.

Q. Your second appointment came in what year, sir?

A. The second appointment came in 1944.

Q. And your third appointment?

A. In 1948. Confirmation came the next year.

Q. And you served until what time?

A. Until April 10, 1953.

Q. Now, in your capacity as Governor of Alaska during the years 1950, '51 or '52, let's say, were

(Testimony of Ernest Gruening.)

you a member of the Territorial Board of Road Commissioners, of the Board of Road Commissioners for the Territory, sir?

A. I was required by Territorial law to be a member, chairman, of that and a number of other boards. That was only one of some dozen boards which the Territorial law required me to serve on.

Q. Were you a member of the Board of Road Commissioners then during the year 1951 and the year 1952, sir?           A. I was.

Q. During the year 1951 did the Board of Road Commissioners engage in a transaction with regard to the purchase of the Ferry Chilkoot? [6]

A. It did.

Q. And will you state briefly what that transaction was, sir, to the best of your recollection?

A. There was, of course, a missing road link between Southeastern Alaska and the Westward part of Alaska, and it was considered desirable to establish that link so that people coming southward from the Interior of Alaska, or having gone up over the highway, and wishing to go to Southeastern Alaska, or vice versa, only to go up from Southeastern to the Interior, would have a service that would take their cars and enable them to accompany their cars, which they could do in no other way except through a ferry service.

Q. Well, the Board of Road Commissioners then did purchase, repair and place in operation a motor vessel known as the Chilkoot; is that correct?

A. That is correct.

(Testimony of Ernest Gruening.)

Q. And that vessel served between what points?

A. Principally between Juneau and Haines with side trips to Skagway, which was also deprived of practically all American service at that time.

Q. Now, in the spring of the year 1952, Governor, to the best of your recollection, did the Territorial Board of Road Commissioners face somewhat of a problem in connection with the operation of the Ferry Chilkoot? [7]      A. Yes, they did.

Q. And would you state very briefly what that problem was?

A. Well, the problem was that no particular appropriation had been made for the ferry as such, and the funds to operate the ferry were the road funds, the funds derived from the revenues of the gas tax, which, I think, at that time was two cents a gallon, and this fund was, of course, used for road construction and road maintenance, and the Board of Road Commissioners, of course, considered that this ferry was a part of the highway system and that it linked two unconnected parts, and so they determined that, as these funds being used for the ferry would deprive certain other sections of the use of road monies for construction, that they would use the revenues as they came in for the support of the ferry. That was one problem.

Another problem was the fact that the crews, naturally, insisted on being paid whenever they completed their tour of duty. The ferry, as I recall it, would go twice a week and would be laid up for

(Testimony of Ernest Gruening.)

a day or two at each end, and, when the crews came back, they wanted to be paid, and in order to pay them promptly it was necessary to have a fund of this kind, otherwise they would have to go through the long delay of having vouchers being processed through the red tape of our government procedure, [8] and so that was considered a problem.

Q. Now, was that problem—first, let me ask, Governor, who were the other members of the Board of Road Commissioners besides yourself?

A. Henry Roden, then Treasurer of the Territory and former Attorney General of the Territory, and Frank Metcalf, the Territorial Highway Engineer; both of them elected officials.

Q. Now, did the Board of Road Commissioners face these problems concerning the operation of the Chilkoot Ferry in a meeting in the early part of June, 1952, to the best of your recollection?

A. Yes, they did.

Q. And that meeting was on or about June 5, 1952, was it not, sir?

A. To the best of my recollection.

Q. What was the result of that meeting with regard to this operation of the Ferry Chilkoot, sir, if any?

A. To the best of my recollection that meeting determined after consultation with the Attorney General that the receipts from the ferry should be deposited in a bank in a fund.

Q. And what use should be made of it?

A. And disbursed for the operating expenses of

(Testimony of Ernest Gruening.)

the ferry, the day by day wage payments and so forth. [9]

Q. Now, Governor, was any question, to the best of your recollection, whatever raised by anyone as to the legality of this particular course of operation, method of operation?           A. None.

Q. Were all members of the Board present, sir?

A. They were.

Q. And do you recall what the vote, if any, or the measure of approval, which this plan received, was?

A. Well, there was no difference of opinion between any of the Board members or the Attorney General.

Q. Now, so far as you know, did the—was that plan or method of operation placed into effect thereafter by the Board of Road Commissioners?

A. It was.

Q. Did you—I take it that, being in the position of a member of a number of boards, that you perhaps were not as fully familiar with the day to day operations of the Board of Road Commissioners as perhaps the Highway Engineer or other members might be; is that correct?

A. Well, that is correct. I mean, the Highway Engineer was somewhat closer to the problem than I would be as a Board member, and the Treasurer also.

Q. In any event, sir, do you recall any mention or any discussion or any comment or problem arising in connection [10] with this method of handling

(Testimony of Ernest Gruening.)

the Chilkoot Ferry, from that time down until about the 25th of September, 1952?

A. Well, after the plan was put into effect it appeared to be operating smoothly, and I heard no comment of any kind until the publication.

Q. Was there anything secret or any attempted concealment by you or any of the members of the Board of this plan which had been placed in operation? A. Of course not.

Q. Now, are you familiar, Governor, with a newspaper known as the Alaska Daily Empire, published by the Empire Publishing Company in Juneau, Alaska? A. Yes, I am.

Q. Did you have occasion to see the edition of the Daily Alaska Empire for the day of September 25, 1952? A. Yes, I did.

Q. I will hand you an item and ask you what it is, sir. Is it a copy of the front page of the Daily Alaska Empire for that date?

A. That is the front page of the Empire of that date.

Q. And is it a line-run copy of the paper, so to speak, of the paper purchased by you at or about the time? A. It is the same.

Q. You have seen other copies of the issue of that day, have you not? [11] A. Oh, yes.

Q. Is it identical with the general run of the papers of that day? A. It is.

Mr. Kay: I will ask that this be offered in evidence if there is no objection. (Handing proposed exhibit to defendant's counsel.)

(Testimony of Ernest Gruening.)

I was going to offer the front page, but Mr. Faulkner pointed out that there is a brief continuation of one of the articles, which is involved in the defense although not in the plaintiffs' case, on Page 5, so I am going to offer the complete edition rather than the front page only.

Q. (By Mr. Kay): Does this appear to be a true and complete copy to the best of your knowledge of the edition of the Empire for the 25th of September, 1952?      A. Yes, it is.

Mr. Kay: I will offer it in evidence.

The Court: I presume there is no objection?

Mr. Faulkner: No; no objection.

The Court: It may be admitted.

The Clerk: This will be Plaintiffs' Exhibit Number 1.

(Whereupon, the jury was duly admonished, and the trial was recessed until 2:00 o'clock p.m., November 15, 1955, and resumed as per recess, with all parties present as [12] heretofore and the jury all present in the box; the witness Ernest Gruening resumed the witness stand, and the Direct Examination by Mr. Kay was continued as follows:)

Mr. Kay: Your Honor, at this time, in view of the rule that the exhibits should be read to the jury while the witness is on the witness stand, I am going to read the exhibit that we have offered in evidence, such portions of it as I desire to, and of course, Mr.

(Testimony of Ernest Gruening.)

Faulkner has the right to read any portions that I do not read.

The Exhibit No. 1 is the front page of the Alaska Daily Empire for September 25, 1952. As you can see, the headline is "Bare 'Special' Ferry Fund." Then across the left-hand margin runs a headline "Reeve Raps Graft, Corruption," and underneath that is a photostatic copy of a check signed "Chilkoot Ferry, Robert E. Coughlin," drawn on B. M. Behrends Bank, Juneau, Alaska. That check reads as follows: "No. 49. Juneau, Alaska, 20 August, 1952. Pay to the order of Steve Larsson Homer. \$398.04," and spelled out, "Three Hundred Ninety-eight and 04/100 Dollars. Chilkoot Ferry, Robert E. Coughlin."

Beneath that check appears the following in rather heavy small type: "Shown above is a photostatic copy of a check drawn on the special 'Chilkoot Ferry' account and signed by Robert E. Coughlin. The check is in payment of wages to Steve Larsson Homer, then an employee of the Territory [13] serving aboard the MV Chilkoot. This is but one of a number of checks so drawn since the special account was opened at the B. M. Behrends Bank. Auditor Neil Moore requested a statement of the account showing deposits and disbursements, but was told by bank officials that the bank would give him no detailed information concerning the account."

Then the subheading on the right-hand part of the paper covering three columns reads as follows: "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash



(Testimony of Ernest Gruening.)

to Private Bank Account." Beneath that: "Auditor Neil Moore and Assistant Attorney General John Dimond Halt Payments from Fund. By Jack D. Daum." The article reads as follows: "To avoid paying territorial money into the general fund as provided by law, Governor Gruening, Treasurer Roden and Highway Engineer Frank Metcalf have set up a 'special fund' at a Juneau bank, territorial auditor Neil Moore disclosed today."

Subheadline: "Illegal Payments." "The 'special fund,' which dates back to early last year, is in the B. M. Behrends bank under the name 'Chilkoot Ferry— by Robert E. Coughlin.' Into it have gone the receipts from the operation of the ferry which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged.

"After learning of the unauthorized account [14] late last month, Auditor Moore and assistant attorney general John Dimond ordered the bank to stop payment on all checks drawn against the account.

"The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." Then it goes on.

I am stopping now at the end of the—one, two, three—fourth paragraph in order to avoid burdening the record here, and down to the continuation

(Testimony of Ernest Gruening.)

of the story on Page 2, and I will read to you the last two paragraphs of the article: "Since then there has been no further action in the case. Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr., who said last night he is the sole prosecuting officer in this division for territorial and federal criminal cases.

"The Empire learned of the unprecedented transaction when Homer told the story to a reporter." — "when Homer told the story to a reporter."

Now, then, also there is on the front page a bold-faced editorial, two-column editorial, running the length of the page, more or less on the left-hand center of the page, beneath the photostatic copy of the check, headed in black print, "Start Talking, Boys (An Editorial). Disclosed in [15] today's Empire is a story almost too fantastic for belief, but the facts have been personally verified by both the territorial auditor and assistant attorney general."

I am stopping reading and going on down here to the—one, two, three, four, five, six, seven, eight—ninth paragraph of the editorial which reads as follows: "If this method of by-passing the law is acceptable to the attorney general and the U. S. district attorney, why is it not possible for every department head who finds himself running over his appropriation to set up 'special funds' from the money his office takes in?"

And skipping then to the final paragraph of the

(Testimony of Ernest Gruening.)

editorial which reads as follows: "Oscar Olson sits today in his prison cell, dreaming of the days when he thought territorial laws were only for the underlings."

Of course, the entire editorial will be before you, ladies and gentlemen, the entire paper, and you can examine any other portions of it. I merely wanted to bring out those particular portions by reading them at this time. Mr. Faulkner can read the balance if he wants to, or it will be available to you in your deliberations to read the entire article as of course you will probably want to do.

Q. (By Mr. Kay): Governor Gruening, I will hand you Exhibit No. 1. Now, Governor, will you tell the Court and jury please in your own words what your reaction was when you [16] first saw the edition of the Alaska Daily Empire for Thursday, September 25, 1952?

A. I was terribly shocked. I was deeply disturbed. I felt as if a pile driver had suddenly hit me on the head.

Q. Governor, referring to the headline, the banner headline, which reads "Bare 'Special' Ferry Fund," can you state whether or not that headline is true or false?      A. False.

Q. What is there about that headline which is false, sir?

A. Well the word "Bare," as if something secret and concealed had been exposed and brought to light; the quotation marks around the word "'Special,'" as if there were something very extraordi-

(Testimony of Ernest Gruening.)

nary and sinister about it; and the size of the type. I had never seen larger type than that used for any story in the Empire; the largest type they had, I suppose.

Q. How long have you lived in Juneau, Governor?  
A. Since 1939.

Q. You have read the Empire almost daily, have you not?  
A. Yes.

Q. Have you ever seen them use any larger type than that for even a declaration of war, Pearl Harbor, the end of the war in Europe, or any other time?

A. I don't recall that they ever used any larger type for any story, no matter what its importance, to the best of [17] my recollection.

Q. All right, sir. Now I refer you to the sub-headline "Reeve Raps Graft, Corruption" and a photostatic copy of the check appearing immediately under it. Can you comment on the accuracy of that subheadline and its position in relationship to the check?

A. Well, anybody looking at this paper as a whole concluded, as I did when I first saw it, that the graft and corruption and the picture of the check were all part of the same story. Any time you reproduce a photostatic copy of a check, it is clearly intended to convey that this check has been unearthed and that it was kept a dark secret and that this is a proof of graft and corruption. That is what I got out of it.

(Testimony of Ernest Gruening.)

Q. Can you comment, sir, on the heading, the headline which appears over the right-hand three columns of the paper, subheadline, "Gruening, Met-Calf, Roden Divert 'Chilkoot' Cash to Private Bank Account"? State whether that headline is false or an accurate——

A. It is false.

Mr. Faulkner: If the Court please, just a moment. I don't like to interrupt and I don't mind too much having Governor Gruening state his impressions, but I think that these questions are not proper. In considering the matter of what is libel in a publication of a newspaper the whole [18] article, headlines and all, must be read together. And, if the Court has any doubt about this, I would like to——

The Court: I have no doubt about that, counsel. The jury will be instructed that the whole article must be read together. However, the witness can state whether certain portions of the article are true or false——

Mr. Kay: That was all that I was attempting to do, your Honor.

The Court: ——and may explain wherein it is true or false.

Mr. Faulkner: Yes; but you can't say whether a headline is true or false unless it is in relation to the article itself, because the Court of Appeals has held in——

The Court: The witness is referring to the article itself. I think he may explain.

(Testimony of Ernest Gruening.)

A. Well, that is false. Gruening, Metcalf and Roden did not divert anything to a private bank account. It was a public account held for the purpose of paying public expenses on a publicly run enterprise. There was nothing private about it. And the word "Divert" clearly implies that there was something crooked and underhanded about it.

Q. (By Mr. Kay): In other words, "divert" ordinarily implies a turning into channels, I believe the dictionary definition would be, other than those that are proper and legitimate. Am I correct? [19]

A. You are absolutely right. That is what I gathered.

Q. Now, Governor, I will refer you down to the body of the article and call your attention particularly to the third paragraph—no—the fourth paragraph of the article itself by Jack D. Daum, the seventh column of the front page: "The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds." And I ask you whether that statement is true or false, sir?

A. Oscar Olson was sent to jail because he was a thief. He stole public money. And this story says that our case closely parallels it. It is just as false as anything can be.

Q. Is that parallel—I have noted that that parallel is again repeated in the editorial "Start Talk-

(Testimony of Ernest Gruening.)

ing, Boys"; is that correct, the last paragraph of that editorial?

A. Yes. Well, that also isn't correct.

Q. Is that a true or false implication contained in that last paragraph of the editorial about Oscar Olson?

A. I think the implication is false in two ways. In the first place it again draws the parallel with Oscar Olson sitting in his cell; but it goes on to say, "dreaming of the days when he thought territorial laws were only for [20] the underlings." That isn't what Oscar Olson went to jail for, for thinking that laws were made only for the underlings. He went to jail because he embezzled money, thousands of dollars, and stuck them in his own pocket and spent them. That is why he went to jail.

Q. Now, Governor, we have gone over these items in stories and the editorial to which I have called attention. I call your attention to the next to the last paragraph—will you turn to the second page of the issue of September 25th, Governor—the next to the last paragraph of the article over here in the sixth column—eighth column, pardon me. That paragraph reads: "Since then there has been no further action in the case. Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr., who said last night he is the sole prosecuting officer in this division for territorial and federal criminal cases." Can you state whether

(Testimony of Ernest Gruening.)

or not that paragraph conveys a true and accurate——

A. Well, it is perfectly clear that that was a paragraph planted to convey the intent of criminality. Mr. Gilmore hadn't said anything about the case, but the writer said, "Any investigation to determine the extent to which the law has been broken now rests presumably with the U. S. district attorney, P. J. Gilmore, Jr.," and the writer [21] of course knew that the U. S. District Attorney was the man who would prosecute criminal cases, but Mr. Gilmore didn't say that. He merely is quoted as saying that he would be the only prosecuting officer if it were a criminal case.

Q. For all Territorial and Federal criminal cases.

A. This is dragged into give the impression very definitely that a crime had been committed and that we had committed the crime.

Q. And now, Governor Gruening, as a result of this publication of this article, articles, and editorial and the layout of the Empire on this particular occasion of September 25, 1952, you have already said, I believe, that you suffered, or that you were shocked and highly disturbed by this. What, if any, effect did that have on your mental attitude, Governor, your mental feelings, let us say?

A. Well, I felt in a daze, as if I had been charged, and I had been charged before the whole world in the most extensive manner, the whole front page that was visible, of being a criminal and por-



(Testimony of Ernest Gruening.)

trayed to my fellow citizens not only in Alaska but "Outside" as having been guilty of a crime.

Q. Governor, do you feel that you suffered damage to your reputation by reason of the publication of the Juneau, [22] Alaska, Daily Empire of September 25, 1952?

A. No question about it. Many people believe everything they read in a newspaper, and, certainly, when it is presented in this kind of a form, few people could overlook it.

Q. How long had you been in public life, sir, prior to this publication of September 25, 1952?

A. I had been continuously in public life for eighteen years.

Q. Had you—I presume during that period you had had your share of criticism of one kind or another?      A. Oh, yes, certainly.

Q. Had you ever before, Governor, had an accusation comparable or in any way comparable to this leveled at your reputation?      A. Never.

Q. Governor, do you feel that you suffered any damage to you in your capacity as a public official, as Governor of the Territory of Alaska, sir?

A. Well, the most important thing that a public official has is public confidence, the confidence of the public, the confidence of superiors, the confidence of his associates, here and in Washington, and that confidence certainly was shaken by an article of this kind by a paper presumably responsible, the leading paper in the capital, the only daily paper, the capital of the [23] Territory.

(Testimony of Ernest Gruening.)

Q. Now, at an earlier point in your examination, Governor Gruening, you referred to this as, I forget your words, the last straw or the climax of a campaign which had been, you felt had been, waged against you by the Empire over a period of years. Am I correct in that?      A. That is correct.

Q. I wonder if you could give us a few examples of this campaign from your best recollection.

A. Well, of course this campaign extended over a period of ten years, more or less, and the Empire missed practically no opportunity to denounce me, criticize me, to find fault with everything that I did, almost everything, certainly, and to imply that my motives were base, that I was intellectually dishonest, that I wasn't sincere in what I was trying to do. This was universally known in Juneau, that that was the attitude of the Empire. And, even at times when what I did was in agreement with policies of the Empire, they would find an opportunity to find fault. There was a period when for some reason of their own they actually left my name out of every news story for a considerable period, referring to me only as the Governor, whereas everyone else in the story would be mentioned by name. Now, I don't know just what the purpose of that was, but it certainly wasn't a friendly [24] purpose. It showed a certain very definite animosity without any question, and that continued for some time.

Q. I believe that at my request, Governor, you culled out a few newspapers, which you were able

(Testimony of Ernest Gruening.)

to find and which were available to you, to demonstrate this testimony that there was a considerable period of time when the Empire instead of referring to you by your given name referred to you only as the Governor of Alaska?

A. That is correct. It lasted some time.

Q. I will hand you a group of newspapers and ask if you will examine them and either mark them, or, if they are already marked, you need not do so, but, if they are not marked with references, will you mark them, sir? Just mark them, and then I will ask about them.

A. Well, here is a story.

Q. You need not discuss the story, sir. If you will just mark them, then I will bring them to the jury's attention.

A. That one is marked.

Q. While you are examining those others, perhaps I—

Mr. Kay: I am sorry. I should offer these to you (handing proposed exhibits to defendant's counsel).

The Court: For identification refer to the dates, counsel.

Mr. Kay: I will, and I am going to also offer them [25] all as one exhibit.

The Court: I mean, as the witness identifies them.

A. Now, I want to say, add, that these deletions of my name did not merely occur in stories written in the Empire office. They went so far as to include

*(Testimony of Ernest Gruening.)*

Associated Press stories from Washington stories that are supposed to be can pretty much as they are sent, stories that have had of taken the reliability and responsibility and reputation of the Associated Press, and even in those stories someone in the Empire office would cut out my name whenever it appeared. Here is an example of that.

Q. This is in the edition of Thursday, January 16th.

A. Here is another example of an Associated Press story from Washington on an important matter in which my name was taken out whenever it appeared but every other official's name was left in it.

Q. This is in the edition of November 3, 1946. The first one was January 17th.

A. Here is another story of that same kind.

Q. This is from the November 9, 1946.

A. Here is still another story concerning to Alaska's Governor, who apparently had no name.

Q. This is from the November 11, 1946.

A. Here is still another. These are only a few examples taken at random. [16]

Q. Do you recall how long this treatment went on, Governor?

A. Oh, it lasted for months anyhow.

Q. This is from the February 10, 1947, an article on——

The Court: 1947?

Mr. Kay: February 10, 1947; yes, sir.

Q. By Mr. Kay: I take it that you are not

(Testimony of Ernest Gruening.)

offering this as any objection to their failure to print your name but merely as an example of their journalistic practice?

A. Well, it was an example of their attitude, to leave my name out wherever possible, often to omit an important participation that I might have had in public affairs so as to deny the public the evidence of that participation and to emphasize unfavorable things.

I remember one case in particular, which is not exactly the same but it is parallel in motive. There was an important hearing of a Congressional committee, the Committee on Public Lands, which came to Alaska, I believe, in the late winter of 1952, if my recollection is not wrong as to the date. This committee was trying to study what was wrong with our land laws and to undertake a drastic revision. It was an important committee. It held only two hearings in Alaska, one in Juneau and one in Anchorage. And I was the first and principal witness and I appeared and testified at some length, possibly three-quarters of an hour, and I was followed by [27] a distinguished citizen of Juneau, who happens to be Mr. Bert Faulkner, counsel for the opposing side, and Mr. Faulkner began his testimony by saying that I had covered the subject so well and so completely that there was really little or nothing for him left to say, and on various occasions during his testimony he repeated that; he said it several times; but, finally, getting warmed up, he did speak at some length. That hearing was covered by the

(Testimony of Ernest Gruening.)

Empire by Mr. Jack Daum. My appearance was never mentioned. Mr. Faulkner's was mentioned at considerable length, although he came along and said he agreed with and approved everything I had said.

Q. In other words, then, as far as the public went, if they read the Empire, you never were at the hearing?

A. I might just as well not have been there, although I was the principal witness.

Mr. Kay: Now, I don't want to take the time of the Court or of the jury to read all of these examples. I am going to offer them. I have already shown them to Mr. Faulkner. They are offered only for this one purpose, of showing the omission of the name Gruening or Ernest Gruening entirely from the columns of the Alaska Daily Empire and reference to him only as the Governor, Alaska's Governor or Governor of Alaska. I am offering them only for that purpose.

The Court: Any objection, considering the purpose [28] of the offer?

Mr. Faulkner: No objection.

The Court: It may be admitted for that purpose.

Mr. Kay: Six copies of the Alaska Daily Empire, one exhibit.

The Court: Could you attach them together as an exhibit?

The Clerk: Six copies of the Empire are marked Plaintiffs' Exhibit No. 2.

(Testimony of Ernest Gruening.)

Mr. Kay: As I said, I am not going to read these. You will have an opportunity to read them. They will be among the exhibits that you will be allowed to take with you, and they are offered for that purpose, to show the Empire, for whatever reason you may conclude, adopted this rather peculiar practice.

Q. (By Mr. Kay): Now, along the same lines, Governor, I believe you testified at one point there that even in Associated Press stories from outside Alaska that the Empire deleted your name; is that correct? A. That is correct; yes.

Q. I will show you a photostatic copy of a portion of the front page of the Alaska Daily Empire for June 26, 1946, and ask you if the right-hand column contains an Associated Press story?

A. That is true; yes. [29]

Q. Did that same story appear elsewhere in the press of the Territory of Alaska?

A. Yes. It appeared throughout the Territory.

Q. Did it appear particularly in the Ketchikan Chronicle for June 26, 1946? A. It did.

Q. Is this a carbon copy, a true, correct carbon copy, of that same release as appeared in the Ketchikan Chronicle for that date?

A. Yes; the date being June 26, 1946.

Mr. Kay: I will offer these in evidence as Plaintiffs' Exhibit 3 (handing to defendant's counsel). There being no objection, your Honor, I will offer it as Plaintiff's Exhibit 3.

(Testimony of Ernest Gruening.)

The Court: It may be admitted.

Clerk of Court: So marked as Plaintiff's Exhibit 3.

Mr. Kay: I think I will take the time—it is very short—to read this to the jury because I find it rather amusing myself. The Associated Press story that appeared in the Ketchikan Chronicle reads as follows:

“Washington (AP)—Secretary of the Interior J. A. Krug said yesterday he plans to visit Alaska, probably in August, but declined comment on criticism of Governor Gruening's trip here with a delegation seeking air service to the Territory. [30]

“Krug was asked at a press conference for comment on the statement by Senator Mitchell (D-Wash.) that he would ask for an investigation of Gruening's participation in the flight from Anchorage here by an Alaskan group seeking a direct mid-west Alaska air route.

“Members of the group said they opposed a direct line from Seattle to the orient. Gruening said yesterday the Alaskans would not oppose the Seattle line if they could have direct mid-west connections.

“The Anchorage Chamber of Commerce organized the trip. Gruening said each person in the party paid his own way.”

Here is the story that appeared in the Daily Alaska Empire:

“Washington, June 26.—Secretary of the Interior J. A. Krug says he plans to visit Alaska, probably in August, but declined comment on criti-



(Testimony of Ernest Gruening.)

cism of the Alaskan Governor's trip here with a delegation seeking air service to the Territory.

“Krug was asked at a press conference for comment on the statement by Senator Mitchell (D-Wash.) that he would ask for an investigation of the Alaska Governor's participation in the flight from Anchorage here by an Alaskan group seeking a direct mid-west Alaska air route.

“Members of the group said they opposed a direct [31] line from Seattle to the Orient. The Alaska Governor said yesterday the Alaskans would not oppose the Seattle line if they could have direct mid-west connections.

“The Anchorage Chamber of Commerce organized the trip. Alaska's Governor said each person in the party paid his own way.”

Q. (By Mr. Kay): Who was Alaska's Governor at that time, Governor Gruening?

A. Well, I think you know the answer.

Q. Now, do you have—I will call your attention to perhaps another example, Governor Gruening, with reference to the status of Indian reservations in the Territory of Alaska. Could you tell us about that, sir?

A. Well, that was an example of where my views, publicly expressed, happened to coincide with those of the Empire, but not only did the Empire give me no credit for that but they attacked me editorially for taking a position which they had taken themselves, and the circumstances were these.

Secretary Ickes and some of his subordinates

(Testimony of Ernest Gruening.)

conceived the idea of extending Indian reservations all over Southeastern Alaska and carving out large sections of land and withdrawing them from use and making them Indian reservations, and, as far as I could detect, very few people in Alaska shared that view, either Indians or [32] whites, but they insisted on doing it, and these claims were pressed by certain Indian lawyers, and the Empire had an editorial criticizing these Indian lawyers for their tactics.

In 1952 the United States Senate had an investigation of this matter, and the investigating committee summoned me to appear before it, and I testified as to my views on this matter, and then the editorial in the Empire criticized me for this testimony that I had given and for partaking in this, although, in the first place, I was called to testify, and, in the second place, the views I had expressed were exactly the same as the views the Empire had expressed.

Q. Now, I will hand you—let's see if you can put this in chronological order for me. This will be offered as one exhibit, incidentally, relating to this one point. There appear to be four items.

A. Well, here is first of all an editorial entitled "Indian Reservations," which gives the general attitude of the Empire that the setting aside of reservations and making Indians live on them was contrary to good policy and contrary to the wishes of the people of Alaska.

Q. Where is the date of that? Is that dated December 29, 1949; is it, sir?

(Testimony of Ernest Gruening.)

A. Yes. And here is another one—the date is not given—on [33] the same subject—I think the date could be identified—entitled “Another ‘Grab,’ ” and even reprinting along the same lines an editorial from the Ketchikan Fishing News entitled “The ‘Ickes’ Blight.”

And then here is a third editorial, from the Empire of December 5, 1947, entitled “They Asked for It,” in which sharp criticism is voiced of Indian lawyers. Starting, the editorial says: “The Indians of Southeast Alaska and elsewhere, who have blindly followed the advice of their glib attorneys from back East” and so forth.

Then, shortly after I testified in Washington before a Congressional committee to which I was called, a Senatorial committee, came the editorial entitled “Indians vs. Bureaucrats,” in which it says, “More recently, Governor Gruening joined the pack snapping at the attorney’s heels.” I don’t know whether the Empire considers themselves part of the pack or not, but they had taken advantage of the same position. And then it ended up by saying, after a number of uncomplimentary references, “Gruening makes great pretense of friendship for Alaska natives and clouds the air with promises of all the fine things he is going to do for them. One very fine thing he could do is to respect their status as citizens and put an end to his usual buttinski [34] tactics.”

Mr. Kay: I will offer these groups relating to

(Testimony of Ernest Gruening.)

the matter of Indian attorneys and comment on them as one exhibit, if I may.

Mr. Faulkner: That will be 4?

Mr. Kay: That will be Exhibit No. 4, containing four items, four separate editorials in the Daily Alaska Empire.

The Court: It may be admitted.

Clerk of Court: That will be so marked—Exhibit 4.

Q. (By Mr. Kay): Now, calling your attention to perhaps one other item that you may wish to discuss briefly, was there, back in 1944 was there, an affidavit of some kind published relative to certain accusations against you, published in the Daily Alaska Empire for April 12, 1944? A. Yes.

Q. I will hand you these papers and ask you to identify them for me and place them in their proper order, if you will, and discuss the incident.

A. Well, a man, who had come to my office on several occasions because he had been squeezed out of a homestead when the outlines of Glacier Bay were enlarged and in want of help, came into my office and asked me a number of questions about the coming election, and the man had come up several times, and we had done everything we [35] could for him. Then there appeared in the Empire an affidavit with this note: “(Editor’s Note: This morning we were approached by a Juneau man and fisherman with a story which was so shocking to us in its implications and content that we could hardly believe it. For this reason, we asked the person, who

(Testimony of Ernest Gruening.)

requested we withhold his name at this time, to make a sworn statement, which he did. The statement was signed and duly notarized and sworn to. We will have editorial comment on it tomorrow."

It tells that I had called this man to my office and had tried to tell him how he should vote at the next election. The story was false from beginning to end. The man was on a boat. He had no telephone. I had no way of calling him or would never have called him. And he was a criminal. He was a man who had served three to fourteen years for forgery in the State Penitentiary at Boise, Idaho. He had served six months in the Federal Jail in Juneau for violation of the Bone Dry Law. He was planted on me for the deliberate purpose of securing this affidavit, which appeared the next day, without any attempt being given to me to check whether this story was true.

No responsible paper would print a thing of this kind without at least going to the other party and saying: "Did this happen? What is your side of the story?" [36] They printed this wholly false affidavit and, while I immediately wrote a communication to the Empire saying it was false and at the same time there was a communication from four of the United Trollers repudiating this man, The Empire proceeded to comment adversely editorially on the same day.

The result of this was that I was questioned sharply by the Secretary of the Interior as to whether I had been guilty of the practices which the

(Testimony of Ernest Gruening.)

Empire affidavit alleged I had. Of course I hadn't. I had a witness in my office—my secretary.

Q. This exhibit contains the so-called affidavit and the Editor's Note—"Fisherman Reveals How Federal Officials Try to Control Election"—

A. Yes, sir.

Q. —the communication from you and the communication from the four fishermen that you mentioned with regard to the gentleman in question—

A. And the criminal record of the man.

Q. And you say that the Empire at about the same time commented favorably, or continued to comment?      A. Yes, it did; on that same day.

Q. And then there is also here a letter from Secretary Ickes demanding an explanation.

A. Which is an evidence of how a publication of this kind [37] destroyed a confidence of your own superiors. Of course I was able to explain the story satisfactorily because I had witnesses.

Mr. Kay: This is a sworn affidavit (handing proposed exhibit to defendant's counsel). I offer this in evidence without objection. It is Plaintiffs' Exhibit—what—is it 5?

Clerk of Court: Plaintiffs' Exhibit No. 5.

The Court: It may be admitted.

Mr. Kay: Mr. Faulkner has kindly offered to stipulate with me that all these exhibits can be used in argument by either side without the necessity of reading them to the jury at this time.

The Court: Very well.

(Testimony of Ernest Gruening.)

Mr. Kay: It will save us the trouble of doing that.

Q. (By Mr. Kay): Now, Governor, I have here a group of editorials which I am going to offer to you and then offer as one exhibit: an editorial, Friday, May 25, 1951, entitled "Governors' Trip"; editorial, September 7, 1951, entitled "Trouble in Paradise"; September 13, 1951, entitled "Another Stab in the Back"; April 14, 1952, entitled "The J-J Clambake"; April 15, 1952, entitled "R. E. (Anything for a Laugh) Sheldon." May I ask, sir, if these are all editorials clipped from the Alaska Daily Empire of the issues, days, on which they are dated? [38] A. Yes, they are.

Q. And do they relate, all of them, to this campaign, concerning which you have testified, on the part of the Empire?

A. They do. They are evidences of continual malice and animosity and hatred.

Q. In your opinion?

A. In my opinion; yes.

Mr. Kay: I will offer these in evidence as one exhibit (handing proposed exhibit to defendant's counsel.) Without objection, I will offer them in evidence, sir.

The Court: They may be admitted. The editorials will be admitted as one exhibit.

The Clerk: They are marked Plaintiffs' Exhibit No. 6.

Mr. Kay: I am going to refer briefly to some portions of these editorials. For example, on Fri-

(Testimony of Ernest Gruening.)

day, May 25, 1951, this editorial entitled "Governors' Trip," the editorial is discussing the visit of Governor Earl Warren of California to the Territory of Alaska, discussing the visit of the Governor accompanied by Governor Gruening to Fairbanks. The editorial concludes: "The Governor of California then unknowingly stepped into the trap and in an anti-statehood Fairbanks where he was guest of its University he delivered a speech on statehood that was plainly from the notebook of the statehood [39] committee.

"What was to have been a delightful social affair turned out an embarrassing political rally for statehood and the Governor's fair-haired favorites.

"It was an imposition on the good nature of a greater leader when he was used for such a lowly and purely selfish purpose.

"The rest of Alaska must surely be bowing low in humble apology today for the untoward action of its governor."

In an editorial, Tuesday, April 15, 1952, entitled "R. E. (Anything for a Laugh) Sheldon," appears this paragraph, which is the fourth paragraph of the editorial: "If Sheldon gave this inconsistency any thought, which he apparently did not, he must have smiled, too. Because the very reason Sheldon is running for Auditor is to help Gruening keep his gang together in spite of decent Democrats."

In the editorial, entitled "The J-J Clambake," for April 14, 1952, the fifth paragraph on the right-hand column of the editorial reads as follows: "Al-



(Testimony of Ernest Gruening.)

though the meeting was held ostensibly to permit candidates for office to be heard (and several were heard) the end result was a mass declaration of fealty to the Gruening regime. One Gruening creature, Bobbie Sheldon, criticized his opponent for the office of auditor, saying that Auditor Moore had 'let the party down.'"

And then going down to the next paragraph: "After the candidates had been heard, the assemblage was treated to [40] a ten-minute talk by Governor Gruening. His Excellency, as he was affectionately addressed, brayed happily about the successes enjoyed by the Truman administration and his own and went on to take a few pot shots at a group of Juneau citizens whose views are apparently at variance with his own."

The editorial concludes: "Certainly, socialism for Americans was not the aim of either Jefferson or Jackson. Neither, we think, was Trumanism or Grueningism."

And an editorial for September 13, 1951, in the Empire, "Another Stab in the Back." It is discussing the removal of the Secretary of Alaska, Lew Williams. The opening paragraph reads as follows: "The removal of Secretary of Alaska Llewellyn M. Williams is the latest in the long series of Gruening purges. although the governor insists, with wide-eyed innocence, that he 'had nothing to do' with Williams' dismissal. Ananias was a piker.

"We find ourselves unable to swallow that denial. It is unthinkable that any governor's second-in-com-

(Testimony of Ernest Gruening.)

mand would be dismissed except on that governor's recommendation. Certainly no such removal could occur without his knowledge and consent."

The editorial ends: "We wonder how much longer the Department of the Interior will continue to humiliate the people of Alaska by subjecting them to the one man rule of 'Alaska's Little Caesar.'" [41]

Q. (By Mr. Kay): Governor, do you happen to know who Ananias was?

A. Well, he was a famous character in Greek mythology who was noted as an invariable liar. The word "Ananias" is equivalent for liar.

Q. So to say that Ananias was a piker, with reference to you, is to say that——

A. That is right.

Q. ——that you exceeded Ananias in your ability to lie?      A. That is right.

Q. Is there any other implication possible to be drawn from that?      A. No.

Mr. Kay: The editorial of Friday, September 7, 1951, in the *Empire*—we have another editorial, entitled "Trouble in Paradise," and it is a complete discussion of, or completely devoted to Governor Gruening's address before the Alaska Science Conference at McKinley Park. The editorial says: "The governor, according to the Associated Press, expressed himself as being of the belief that the Interior Department is retarding the growth and prosperity of the Territory," says the *Empire*. "Now, far be it from us to dispute such an obvious truth, al-

(Testimony of Ernest Gruening.)

though it becomes one of the infrequent occasions when we find ourselves in accord with Governor Gruening in matters of governmental policy. [42]

“We subscribe wholeheartedly to his expressed belief that the Interior Department is indeed a deterrent to the Territory’s economic development, but we are intensely curious as to the reasons prompting his unusual observation.”

And then they go on to question his motives.

“For unusual it is. Ernest Gruening has long been an Interior Department man and has long supported the more than somewhat socialistic projects and policies of that department. And, in turn, the department has gone to bat for the governor in time of need.

“Having learned the hard way to be suspicious, we are prone to speculate in the Governor’s motives in expressing such a sentiment. We are aware that Dr. Gruening is far too astute a politician for this to be dismissed as a slip of the tongue. So there must be another—and a more practical—reason.”

It goes on to discuss this question in such terms as: “On the optimistic side, we wonder if this could mark a step to the right. Perhaps the author of the well known diatribe against private ownership of utilities has undergone a change of heart in the years between publication of ‘The People Pay’ and today’s grabbing campaign by the Bureau of Reclamation (another creature of the sprawling Interior Department).

(Testimony of Ernest Gruening.)

“Or, can it be that ex-Republican Gruening has [43] repented his ways and contemplates a return to the GOP fold?

“We don’t profess to know the answers. But we certainly are curious.”

The Court: I think possibly it should be made clear to the jury that these editorials are not introduced in evidence for the purpose of indicating whether or not any damage should be based upon the editorial complained of, of September, 1952; that is, there is no claim before this Court or jury with regard to these editorials: but only to show the question of what we call malice, to show the intent and purpose with which the publication complained of was issued; and there is no possible damage could be predicated upon these editorials.

Mr. Kay: I am glad that your Honor brought that out. It is not the purpose of course. The entire basis of the lawsuit and the damages that we claim are entirely related to the issue of September 25, 1952. These are merely, as his Honor has pointed out, as evidence of what the Governor has characterized as a campaign over a long period of years against him by the Empire, of which this was merely the last straw.

Q. (By Mr. Kay): Now, Governor, something that I probably should have done earlier in the testimony and just overlooked. I will show you a copy of the Alaska Daily Empire for October 8, 1952, and ask you if that is, from your experience and as a reader of the Empire over a [44] long period of

(Testimony of Ernest Gruening.)

time, perhaps typical of their usual front page layout?

Mr. Faulkner: If the Court please, I will object to anything that occurred after September 25th, that was the basis of the charges here.

Mr. Kay: Well, your Honor, I am only offering this—one of the affirmative defenses, as I understand the law which Mr. Faulkner has offered, is fair comment, or, as it is sometimes put, a qualified privilege, and in that respect I think it would be relevant. Certainly, that privilege would be destroyed perhaps—it is my contention that it would be—if there is an overemphasis, an overplay, in the news story, going beyond fair comment and fair criticism, and I have ample authority in that regard. I have many other copies of the Daily Alaska Empire here. I didn't pick this one out for any other purpose, nothing whatever except to show contrast and layout between a normal day's publication of the Alaska Daily Empire in the opinion of this witness which of course—

The Court: I understood from the objection of Mr. Faulkner that what was offered here was something which occurred subsequent to September, 1952.

Mr. Kay: Just a few days.

The Court: And his objection was that that would not be relevant.

Mr. Kay: It was only a few days later. [45]

Mr. Faulkner: I would like to see it.

The Court: For the purpose offered, merely for the purpose of comparison, I see no objection.

(Testimony of Ernest Gruening.)

Mr. Faulkner: I wonder if I could see it.

Mr. Kay: Certainly. I picked it because there didn't appear to be anything controversial about this case or anything else, counsel.

Mr. Faulkner: Is there any particular thing in there?

Mr. Kay: Not a thing, as far as I can see.

Mr. Faulkner: No objection.

Mr. Kay: Only for comparative purposes, I offer that.

The Court: It may be admitted for the purpose offered.

Clerk of Court: This will be Exhibit No. 7.

Mr. Kay: Just offered, ladies and gentlemen, for the purpose that I have explained to the Court, which I know most of you heard, just to compare what the Governor, at least in his opinion, has testified is a typical copy or front page of the Alaska Daily Empire with the page of which we compare—I mean, of which we complain—and both of them of course will be before you. The most important news on this page appears to have been that Juneau held a municipal election and named three councilmen [46]

Mr. Faulkner: That is for the purpose of showing what he thinks it should be.

Mr. Kay: Just for the purpose of showing comparison.

Mr. Faulkner: Yes.

Mr. Kay: In other words, it relates entirely to the opinion of the Governor between those two

(Testimony of Ernest Gruening.)

papers. I could compare the day that the Yankees won the World Series, the following day, but it does contain an editorial relative to this matter, and so I did not do so.

The Court: Then, you are not offering, counsel, as you suggested in your opening statement, any publications to show this malice after the date of the publication complained of? You did say in your opening statement you intended to offer that.

Mr. Kay: You are correct, your Honor.

The Court: My question is of the time. You are not making such offer?

Mr. Kay: We believe that there are two items which are certainly relevant. It was not my intention, frankly, to offer those two items at this time as part of our case, and I will be frank about it, but to offer them perhaps as a matter of—they are properly part of the defendant's case, may I say, and I believe that they will end up perfectly properly before the jury, but it was not my intention to offer [47] them as part of the plaintiffs' case.

The Court: Very well.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Ernest Gruening resumed the witness stand, and the Direct Examination by Mr. Kay was continued as follows:)

Q. Governor, I will show you an item which is labeled "An Open Letter to the Editor," dated No-

(Testimony of Ernest Gruening.)

vember 7, 1952, and ask if you received this copy of that letter and whether or not it was later, or at about that time, printed in the Alaska Juneau—I mean, the Alaska Daily Empire.

A. Well, I think it was published. I am not positive.

Q. You did receive that copy? A. Yes.

Q. You did receive that copy from the author of it; am I correct? A. Yes.

Q. And, as far as you know and believe, it was printed by the Alaska Daily Empire?

A. Well, I am not positive, but that surely could be ascertained. I imagine it was printed.

Mr. Faulkner: You are offering this in evidence?

Mr. Kay: Yes.

Mr. Faulkner: We object to this in evidence. It [48] is a letter written by some man to the Empire—it is purely hearsay; it has nothing to do with the case—expressing his views on three or four different things, and it is purely hearsay and objectionable for that **reason**.

Mr. Kay: I thought it might be admissible——

Mr. Faulkner: It is immaterial and incompetent evidence.

Mr. Kay: I thought it might be admissible, your Honor, on two points. First, it was printed in the Empire, and it is offered in regard to Paragraph 2 of the letter to show—and I will show it to the Court—to show that certain of the public, the effect upon certain of the public of the front page of which we complain.



(Testimony of Ernest Gruening.)

The Court: Such a letter must appear material even though it was published or otherwise.

Mr. Kay: We have been informed that it was published. We have searched our papers and can't find the copy in which it was published.

The Court: It has not been definitely established that it was published. If it is the purpose to show the effect of the articles complained of upon the public, that should be material here.

Mr. Faulkner: The letter actually is referring to the whole policy of the paper, written by a third person who has nothing to do with the case at all. Whether it was [49] published or not, I don't know.

Mr. Kay: A person——

The Court: Just a moment while we examine this.

Mr. Kay: Yes, your Honor.

Mr. Faulkner: We could have a dozen letters like that talking the other way. To introduce them it would prolong this case all winter.

The Court: The element of damage, as brought in issue here, the element of damage would include the reaction of the public to the editorial and articles complained of. The letter being offered for that purpose, to show the reaction of this individual to the articles, appears material.

Mr. Faulkner: I don't think it does, your Honor, show any particular reference to these articles. I read it hastily. I don't see where it does.

Mr. Kay: Paragraph 2.

(Testimony of Ernest Gruening.)

The Court: Their editorials generally.

Mr. Kay: Paragraph 2.

Mr. Faulkner: We could introduce a dozen others the other way.

The Court: Well, that still would be permissible. It is relevant evidence. For the purpose offered, the letter may be admitted in evidence.

The Clerk: That will be Exhibit No. 8.

Mr. Kay: The letter is as follows: "Juneau [50] Methodist Church. Fred McGinnis, Minister. Juneau, Alaska, November 7, 1952, Open Letter to Editor of Empire. Editor, Daily Alaska Empire, Juneau, Alaska. Dear Sir: In order to be candid and honest in reacting to your paper's policies with regard to your editorials and other articles, I would like to express to you the following:

"1. Your editorials generally are the poorest and worst written of any this citizen has ever seen in any newspaper anywhere, barring none.

"2. Your editorials seem to be dedicated to causing the public to 'feel the worse' toward our Governor and a few other men. It seemed to me that you tried to cause the public to think of the Governor as a dishonest, mis-appropriating, unworthy man. You succeeded as far as I was concerned until other information threw different light on certain policies."

"6. Your editorial of November 6th, in which you by implication invite the Governor to leave the Territory, was to my mind the lowest, cheapest and most unworthy type of editorial"—

The Court: That portion is objectionable. We

(Testimony of Ernest Gruening.)

had reference only to your Paragraph 2 in which the writer states that he was convinced that the Governor was dishonest by these editorials.

Mr. Kay: I agree with the Court. [51]

The Court: The balance of it should be disregarded by the jury.

Mr. Kay: I would be perfectly willing to have the balance of the letter either eliminated or the second paragraph clipped out.

The Court: That would be satisfactory.

Mr. Faulkner: May I see it again?

Mr. Kay: Yes, sir. We can clip out the second paragraph as far as I am concerned. The rest of it is irrelevant.

The Court: The rest of it is hearsay.

Mr. Faulkner: I think the letter or any portion of it is inadmissible. Mrs. Monsen tells me it was published in the Empire, together with a letter criticizing it, which they published; in a day or two there was another letter, criticizing this one very severely, published in the Empire. But we couldn't bring the Empire files down here. They weigh tons. You can see how helpless we will be if such things as that are admitted into evidence here.

The Court: Counsel, I don't know that we have made our point clear. If the editorial was published, as you concede, the letter was published, it does not help the situation. Here is a letter from a minister who states that he was convinced by these editorials that the Governor was dishonest. [52]

Mr. Faulkner: No, I don't think he said that.

(Testimony of Ernest Gruening.)

The Court: That is what he says in the letter. And for that purpose that portion of the letter is admitted in evidence. The balance of it may be cut out as counsel has suggested.

Mr. Kay: I will clip out Paragraph 2 and paste it in the middle of a sheet of paper.

The Court: Yes; together with the letterhead.

Mr. Kay: May I merely read the signature?

The Court: Yes; and the signature.

Mr. Faulkner: I ask the Court to renew our objection to the admission of the portion of the letter.

The Court: The objection is overruled.

Mr. Kay: The signature is that of Fred McGinnis.

Q. (By Mr. Kay): Do you know who Fred McGinnis was, Governor?

A. Fred McGinnis was for several years, three or four years, the pastor of the Methodist Church in Juneau, and then he was moved to be the pastor of the Methodist Church in Anchorage, where he is now.

The Clerk: Just Paragraph 2, counsel?

Mr. Kay: Yes; just clip out Paragraph 2, and the signature maybe.

Q. (By Mr. Kay): Oh, one thing, Governor. In connection with our second exhibit, this group of papers which [53] shows the elimination of your name, what was the purpose of calling those to my attention, sir, or my calling them to your attention?

(Testimony of Ernest Gruening.)

A. Well, I think it is just one piece of evidence of this long hostility. I don't know that those particular deletions hurt me any, the way the other things did, but the paper certainly must have gone to a lot of trouble every time a story came in involving the Governor to go through it with a blue pencil and take out his name, and, certainly, instructions to that effect would indicate that the paper had a very definite bias against me. I have never heard of that performance in any other paper. It was part of the news to leave my name in when I was associated with some public act that was worth reporting.

Mr. Kay: I believe that is all. Your witness, Mr. Faulkner.

### Cross-Examination

By Mr. Faulkner:

Q. Governor, you didn't suffer any harm having your name left out?

A. As I say, I don't think those particular omissions did me any harm.

Q. Now, do you know Mr. Carter, who was at one time editor [54] of the paper while Mrs. Monsen was sick in the hospital in Seattle?

A. Oh, yes.

Q. And you had some trouble with Mr. Carter?

A. No.

Q. Did you have some controversy with him, arguments with him?

(Testimony of Ernest Gruening.)

A. Oh, I guess so; I mean, no particular trouble.

Q. Do you recall whether you even asked Mr. Carter at one time to leave your name out of the paper?

A. No; no. What you have—what I think you have in mind is that, when we gave out releases, I asked him to print them as written and not to cut them and change their meaning and that I would prefer to have releases from the Governor's Office printed as given or not at all.

Q. And the reason—he had cut something that you had given him?

A. Yes. He had cut something to change its emphasis.

Q. Well, Governor, do you recall whether Mr. Carter didn't complain to you that these items that you were giving him to publish were given him, generally, too late to get in the paper and were given to the radio, so they had it first in the evening, and he wouldn't get them until they were secondhand the next day, and that, in order to publish this particular one and get it in the [55] paper in time, he had to cut it; do you remember that?

A. I remember it very well, Mr. Faulkner. The cutting consisted of two sentences and, therefore, could not have possibly delayed the publication. It was a release of considerable length, and cutting out two sentences, which were important sentences, and leaving them in would not have made any difference in time at all.

Q. Do you remember what they were?

(Testimony of Ernest Gruening.)

A. Yes. They had to do with the closing of the Alaska Juneau Mine, and the sentences, which were cut out, were to the effect that the mine had discharged these men in great haste and that it was very unfair to the men not to give them more warning, and the Empire, evidently, considered that was a criticism of the mine management and wanted to delete them for that reason. I thought it was part of my statement. It was a statement signed not only by me but by three other officials, and we took the responsibility for it, and there was no reason why he should take it upon himself to edit our ideas out.

Q. Was that the only occasion when he had to cut things that were given to him late; do you know?

A. Well, offhand, I don't recall any others, but there may have been some. If you can bring any to my mind, I may be able to recall them.

Q. Well, maybe later on. Do you know, about this letter of [56] Mr. McGinnis', don't you know that, as a matter of fact, that letter was written by your secretary?           A. What?

Q. The letter that you just read from Mr. McGinnis, wasn't that signed by your secretary, Mrs. Alexander—written by your secretary, Mrs. Alexander, and signed by Mr. McGinnis?

A. That would be very startling news to me. I don't believe it for a moment.

Q. You don't know that?

A. I think that the minister of the Methodist Church, Mr. McGinnis, was perfectly capable of writing his own letters.

(Testimony of Ernest Gruening.)

Q. Yes; but I am asking about this particular one. You don't know?

A. I do not know that anybody but Mr. McGinnis wrote it.

Q. Well, you don't know whether Mrs. Alexander wrote it or not?

A. Of course not.

Q. No. Now, let's——

A. Did she?

Q. Well, I am not on the stand. We will come to that later on. Now, Governor, you complain of the policy of the Empire.

Mr. Faulkner: I wonder if the Court will bear with me a minute while I—— [57]

Q. (By Mr. Faulkner): Governor, while it is on my mind, while I am finding this, you referred to a hearing up there on the public lands before a Congressional committee where you had appeared first and made a very excellent statement and I appeared afterward and I couldn't say much except to second what you had said and to try to emphasize to the committee that that was correct, and you say—I didn't know this—but you say the Empire published what I said and not what you said?

A. That is right.

Q. Well, could it be that the reporter didn't get up there in time to hear you?

A. That is entirely possible, but that would present no difficulty to a good reporter. He could have asked me what I said. He could have found it out from the record. A written transcript was being made, and he could easily have verified that. That is just common newspaper practice.



(Testimony of Ernest Gruening.)

Q. He could have asked me, and I certainly would have told him, because, do you remember, the next day at the Chamber of Commerce we made a report on this meeting and I reported there on it and gave you the credit and said that what you had said covered the whole ground very plainly, and the Empire did publish that?

A. Well, you were particularly generous in your testimony [58] about my testimony, and that seems to me makes the Empire's omission all the more striking.

Q. Well, on that occasion. But the next day, or maybe two days later, when the Chamber met and we reported it there, the Empire did then refer to my comment on your statement.

A. Well, that was very kind of you.

Q. Now, Governor, you have laid some stress on the fact that the Empire was hostile to you and critical and carried on a campaign against you and your associates. Now, when you came to the Territory as Governor, I will ask if—first—just strike that please. I will ask if it isn't a fact that Mrs. Mosen after her father died became the managing editor and publisher of the Empire, and, as you know, she and her sister own it. Now, when you were appointed Governor, did she send you any telegrams to Seattle when you were on your way to Alaska?

A. I think she did.

Q. These are preliminary, Governor. Did she send a telegram and order some roses placed in your room for Mrs. Gruening? Do you remember that?

(Testimony of Ernest Gruening.)

A. Well, I don't recall it, but she may have.

Q. And then did she—perhaps you will remember this—did she send you a telegram and say she would like to arrange to have a tea for you the day you arrived, if you recall? [59]

A. Well, I think I can answer what you are trying to get at by saying that Mrs. Monsen was very hospitable to us when we arrived.

Q. And, when you arrived to take the Office of Governor, did the Empire publish—December 5, 1939, it seems to be—this editorial which I will hand you?

A. Yes, Mr. Faulkner, it did.

Q. And there was no complaint about that?

A. None.

Mr. Faulkner: I would like to offer this in evidence in connection with the cross-examination of the Governor, an editorial, obviously.

Mr. Kay: No objection.

Mr. Faulkner: Could I have it marked as a Defendant's Exhibit ?

The Clerk: This will be Defendant's Exhibit A.

The Court: The exhibit may be admitted.

Mr. Faulkner: This is not too long, and I would like to read it to the jury now. It is entitled "Our New Governor."

"Juneau extends a whole-hearted welcome today to Alaska's new Governor, Ernest Gruening, who, about the time today's Empire is thumping against the front doors of the town, is taking his oath of office to succeed John W. Troy.

"Dr. Gruening comes from a position in Wash-

(Testimony of Ernest Gruening.)

ington [60] of broader interest and probably wider day-by-day active authority than the office he will fill here. His able administration as Director of the Division of Territories and Island Possessions is recognized and appreciated by Alaskans.

“He comes to an Alaska prospering in its present and, more important, ripe for further development in the immediate future. That Governor Gruening can help Alaska along its path of destiny to eventual statehood none of us doubt.

“The Territory’s one element of disappointment as it looks on its new Governor is that a resident Alaskan was not chosen for the office, and this is no reflection on Governor Gruening. As has been said often since his appointment was first announced, Dr. Gruening is Alaska’s first choice for Governor if a non-resident it must be. In fact, he becomes an Alaskan today and as such we will look on him henceforward. He has a close acquaintance with the Territory through his work in the position he has just resigned. Delegate Dimond pays Dr. Gruening the high tribute of giving him credit for doing more for Alaska than any other man in Washington officialdom. In his several visits to the Territory, Dr. Gruening has traveled over more of Alaska and seen more of life in the north than have many Alaskans.

“Greetings, Governor Gruening, we are all for you. May you be with us many a day! [61]

“Retiring Governor Troy needs no reaffirmation

(Testimony of Ernest Gruening.)

of the very high esteem in which all Alaskans hold him.”

Well, that has nothing to do with it.

Q. (By Mr. Faulkner): Now, Governor, when you came here your relations were friendly with the Empire? A. Yes, they were.

Q. And how long did they continue friendly; do you remember?

A. Well, I think more or less for several years. I wouldn't know the exact date at which they started to be less friendly, but I think after a year or two.

Q. And do you know why? What occurred?

A. Well, I have some ideas on the subject.

Q. Well, wasn't it a matter of disagreement with some of your policies or things you advocated; wasn't the criticism largely based on that?

A. I don't think so.

Q. Well, isn't that a usual thing, for a newspaper to criticize public officials if they don't agree with their public acts?

A. It is perfectly correct and proper to criticize them within certain bounds of decorum and decency.

Q. And they differed—the publisher and editor differed with you in many respects in public matters; isn't that so?

A. Well, they expressed that difference; [62] yes.

Q. Now, you were telling here early this afternoon about the effect of these publications upon you and in the Territory. Now, I will ask you if it isn't a fact that you continued on as Governor even

(Testimony of Ernest Gruening.)

though there was a change in the national administration; you continued on as Governor until the end of your term?

A. Well, there was no change of administration during my first term or second term.

Q. No. I mean, your last term? A. Yes.

Q. That was for the year in which the editorial, the publications, were made; that was '52, wasn't it?

A. Yes.

Q. There was a change of national administration then?

A. Well, I merely completed my term.

Q. Yes; you finished out your term?

A. Yes.

Q. And there was no change made until then, and you stayed on through a session of the Legislature after the change of administration?

A. That is correct.

Q. And then, when you left the Territory, you had some rather eulogistic editorials, published in some other papers? A. Yes. [63]

Q. And one, especially, in the Anchorage Times which referred to you as Alaska's greatest Governor? A. That is correct.

Q. Do you remember that? A. Yes.

Q. So that there was no change in the sentiment or feeling among your friends because of what had been published in the Empire in September, 1952?

A. Well, I think Alaska was divided.

Q. Well, it was divided before, wasn't it, Governor, somewhat?

(Testimony of Ernest Gruening.)

A. Well, I think the division became somewhat sharper as a result of the Empire's policies.

Q. Well, the Anchorage Times did in publishing this very eulogistic editorial refer to you as Alaska's greatest Governor?

A. That was very kind of them.

Q. It was, and perhaps proper, although it might be some reflection on Governor Parks, Governor Troy and some others. And then, Governor, didn't a group of your friends raise money and present you with a Chrysler automobile?

A. They did.

Q. Yes. So that they were still your friends, those who presented the car. I will ask you if the story of that [64] was not published in the Empire just as it occurred? Do you remember that?

A. I see no reason to doubt that it was published.

Q. I will hand you this to remind you of it.

A. Yes; that is correct—"Alaska Friends Present Car to Ernest Gruening."

Q. Yes.

Mr. Faulkner: I will offer this.

Mr. Kay: No objection.

Q. (By Mr. Faulkner): That was, I think, Governor, in all the papers all over the Territory?

A. I think so; yes.

Mr. Faulkner: I will offer this then in connection with the cross-examination.

The Court: Defendant's Exhibit B.

The Clerk: Defendant's Exhibit B; yes.

Q. (By Mr. Faulkner): Now, Governor, you

(Testimony of Ernest Gruening.)

went into some length as to the offense that you felt when these stories were published in the *Empire* in September, 1952. Now, let's go back to the ferry fund. You said that the Board of Road Commissioners decided to handle the ferry funds in the way they were handled by turning the matter over to the purser of the ferry?      A. Yes.

Q. And you said that was done for the sake of—well, more [65] efficient or something to that effect?

A. Well, it was to enable the men to be paid when they finished their run and not have to wait for several days, without which it would have been impossible to keep the crews. They just wouldn't have worked.

Q. And there were many other things paid too, weren't there?

A. Well, that I don't know. That was beyond my—

Q. You were chairman of the Road Commission?

A. Well, it was handed over to the Highway Engineer and to the purser, and I am not familiar with the details of what took place.

Q. But the Board did that; I mean, the Board of Highway Engineers authorized the purser—

A. The Board of Road Commissioners.

Q. The Board of Road Commissioners authorized the purser, Mr. R. E. Coughlin, to handle the funds and to pay the bills. Now—and to do that he opened a bank account—that would be a private bank account, wouldn't it?

A. Well, it would be a bank account of public

(Testimony of Ernest Gruening.)

funds in which he had been delegated the power to disburse. I wouldn't call it a private fund.

Q. Now, you said a little while ago that it wasn't a private fund; it was a public account. Wasn't it a private account handling public funds? Wouldn't that be the way to state it? [66]

A. Well, I think that is more or less quibbling over words. It was not private, in that he did not own that money; no private citizen owned it. It was a public fund, used for public purposes, in which an official delegated by the Board had the power to sign checks.

Q. And that was under the control of a man who was not a Territorial official?

A. Well, he was a Territorial employee in that he was——

Q. Did he have a bond to the Territory?

A. That I do not know.

Q. Well, now, do you know—did you know that in handling the funds that way a considerable portion was lost and not accounted for, that there was a shortage of funds?

A. No, I do not know that, and I doubt whether the Empire knew it when it published that libelous story.

Q. Of course that doesn't make any difference, Governor. I am asking if you know it.

A. I do not know it; no.

Q. The truth is a defense wherever found and whenever found. Now, do you know—you were in office at the end of 1952, the calendar year 1952—



(Testimony of Ernest Gruening.)

now, do you know anything about the audit of the Territory's accounts by the Arthur Anderson Company of Seattle?

A. Well, I know there was such an audit.

Q. You know there was such an audit? [67]

A. Yes.

Q. Did you know that in that audit Arthur B. Anderson & Company found that there was a shortage in this ferry account?           A. No.

Q. Did you know that they also found that the account had been kept in such an irregular and illegal manner that there probably was a greater shortage than they were able to discover?

A. I do not know those facts.

Q. Do you know that they reported that the purser claimed that there was a greater shortage, as nearly as they could get the information there appeared to be a greater shortage than they actually found; do you know——

A. I do not know those facts.

Q. You never read the Anderson report?

A. No.

Q. Do you know who Arthur Anderson & Company is?           A. Yes.

Q. Now, did you know that the purser, who was handling these funds, was issuing checks for cash and taking cash out and paying bills and sometimes issuing checks for people and then cashing them and making certain deductions?

A. No, Mr. Faulkner; I knew nothing of the details of the [68] operation of the ferry after it had been turned over to——

(Testimony of Ernest Gruening.)

Q. But you were present at that meeting of the Board, June 5, 1952, when this was authorized to be done? A. Yes.

Q. Now, do you know—you talked about Oscar Olson and you said Oscar Olson was a thief—do you know under what statute Oscar Olson was sentenced?

A. Well, I am not a lawyer and I can't give you the chapter and verse, but I know that he was sentenced for embezzling many thousands of dollars of Territorial and Federal funds.

Q. You didn't have in mind the particular statute it was filed under; is that what you mean?

A. Well, I don't think I would know it by number or——

Q. You didn't read it?

A. No. He pleaded guilty, and there wasn't any question about his guilt in the matter.

Q. Yes; that is true. Excuse me just a moment. Now, Governor, you had mentioned Mrs. Monsen's hostility to you, and I asked you if that wasn't in connection with your official acts as Governor, and nothing personally, but purely relating to your official acts. I will ask you if you had any controversy with anyone in the Empire about the Palmer Airport Report by the United States Senate? [69]

A. Well, there was of course considerable interest on the part of the Empire reporters and staff about that whole matter.

Q. And there was on the part of some other newspapers too?

(Testimony of Ernest Gruening.)

A. Oh, yes. It was a matter of general interest.

Q. And on the part of the United States Senate which investigated it? A. Yes.

Q. And the Empire took the stand that there had been violations of the law there, didn't they?

A. They took that stand; yes.

Q. And you took the stand that it was slander to say so?

A. I took the stand that the transaction did not justify those criticisms, and that was demonstrated by the fact that the Comptroller General finally paid the bill.

Q. And, now, at the time that the publications occurred in Alaska about the Palmer Airport, the Senate committee had made a report?

A. Yes.

Q. And in that report they found that there were irregularities and they found that an attempt had been made to get \$145,000.00 unlawfully from the United States?

A. No; I wouldn't agree that that was the verdict.

Q. I mean, the report, the report of the Senate committee?

A. Well, the facts were, as I saw them and as I still see [70] them, that this was the first of four airports, one in each judicial division, which were being constructed under the new Territorial Airport Act which had the use of Federal matching funds. The Federal Government passed this act in '46. The '47 Legislature had not taken advantage

(Testimony of Ernest Gruening.)

of it by passing an enabling act, and it was not until '49 that such legislation was passed. It was new legislation for us, and the Territorial Board of Aeronautics was guided by the Federal officials, the C.A.A. officials, who had the final responsibility, and it was upon their advice that we took the acts that we did, and, if there has been anything improper or illegal or dishonest about it, they would have been subject to prosecution, but, as a matter of fact, they were not only not prosecuted but they were promoted, and the net result was simply a smear in the Territory that we had done something that was highly improper.

Q. Well, at the time this publicity was given to this, wasn't there a Senate Report on it which indicated that it was highly improper?

A. Well, the Senate Report was critical of some of the methods that we used in order to speed operations, but that report rather petered out when the Comptroller General reviewed the whole proceeding and authorized the payment. [71]

Q. Well, when did he do that?

A. Subsequently.

Q. Do you remember when?

A. Oh, after the Senate Report had been issued and a lot of pressure was put upon him not to pay it.

Q. In making this report—

The Court: Before pursuing that inquiry further, counsel, aren't we going rather far afield, or

(Testimony of Ernest Gruening.)

do you consider this proper cross-examination for this purpose?

Mr. Faulkner: Well, Your Honor, the Governor talked a good deal about the editorials and publications in the paper as constituting malice or a malicious attitude toward him, and I thought I was entitled to cross-examine him to show just what he considered malicious, and I was going to ask him some questions about this Senate Report, which of course was the basis of the publications in the papers throughout the Territory on that particular thing, and, then, I think I did ask the Governor if he didn't refer to that as slanderous.

The Court: Very well. You are entitled of course to rebut this matter of malice.

Mr. Nesbett: Of course, Your Honor, it is common knowledge that anything the Senate says can't be slander.

The Court: Well, I do not wish to go into that. That is what I am trying to avoid, counsel, getting into a collateral inquiry as to whether a Senate matter is slanderous. [72]

Mr. Faulkner: I am not saying it is slander.

The Court: I do not want to get into that.

Mr. Faulkner: No.

The Court: That is why I asked counsel the question.

Mr. Faulkner: It can't be slanderous.

The Court: We are not concerned with that. We are concerned only with the relations between the Governor and the Juneau Empire. But, if the cross-

(Testimony of Ernest Gruening.)

examination is for that purpose, it is permissible.

Mr. Faulkner: The cross-examination is for the purpose of asking the Governor what he said it was, not what the Senate said.

The Court: Yes; that is proper.

Q. (By Mr. Faulkner): Now, Governor, in the findings and conclusions of the Senate Report—I think you criticized the paper for publishing that, didn't you? Didn't you say that—not referring to the Empire but referring to the authors of this Report—that it was slander?

A. The authors of the report?

Q. Yes.

A. Well, I don't recall that. I know that I made a contribution at the request of the committee giving my views, and it was omitted from the printed report. They claimed that it had been lost in the clerk's office down there in the Senate and they printed it separately, but [73] of course it never reached all the people that were reached by the original report, and, if you have the complete documents, you must have my statement, which I would be very glad to have introduced in the record. That gives my views as I expressed them officially to the United States Senate.

Q. Now, in this Report—first, I will ask you if it was published in the report, if it was published in the paper that you characterized this report as slanderous; would you say that that is true or not true?

A. Well, which Report?

(Testimony of Ernest Gruening.)

Q. Well, the Report of the Senate Subcommittee on the Palmer Airport.

A. No; I would not characterize the report—

Q. You did not?           A. No.

Q. Well, did you refer to anybody's remarks on it as slander?

A. Well, I may have, because I think that some of the editorial comment at the time was of that nature. I think the comment in the Empire was of that nature.

Q. I think you referred not to the Empire but to some others who commented on this as slanderous. And in the Report didn't the Senate committee not only censure the officials of the Alaska Aeronautics Board but also those of the Civil Aeronautics Authority whom you mentioned as sanctioning [74] this? Weren't they condemned too?

A. Well, I think they were criticized.

Q. Yes.

A. But, nevertheless, they did not consider the final judgment as the subsequent facts revealed. Now, the fact of the matter was that the implications in the Empire and similar critical publications were very similar to those in this article which forms the basis of the suit, the implication that there had been personal dishonesty, that some Alaskan officials had profited. If we committed any offense, it was that we were trying to get something for the Territory and get it quickly and to achieve something in return for the long delay that it pre-

(Testimony of Ernest Gruening.)

vented any airports from being built. That was our only offense. Nobody stood to profit by it.

Q. The Report was that you were trying to do that at the expense of the Federal Government?

A. Beg pardon?

Q. The Report of the committee is that you were trying to do that at the expense of the Federal Government?

A. Well, we did not consider it so. We thought it proper to get just as much Federal money as we could for that purpose.

Q. Well, I will just ask you if this appears in that Report, if you recall: "In view of all available facts presented [75] to such committee, we conclude that Edward G. Fisher, Chris Lindsey, and possibly other C.A.A. officials in the Alaska Regional Office were aware of the devious methods which were being employed by Territorial officials in their efforts to obtain Federal matching funds for the Palmer Airport. Furthermore, the C.A.A. officials in Alaska failed in their duty to disclose fully these facts to the C.A.A. officials in Washington who were handling the case." That was in the Report, was it?

A. Yes. Well, what does that amount to?

Q. What it amounts to is that—

The Court: That is precisely what the Court—I understood, counsel, that your purpose in this examination was to show some—to rebut any evidence of bias between the Governor and the paper.



(Testimony of Ernest Gruening.)

Now, then, how do you contend that what you have here shown is material?

Mr. Faulkner: Your Honor, the Governor has been trying here to make out that the paper was angry at him and they had a bitter feeling and they were malicious and that they published these things because of that. Now, I want to show his feeling toward the paper based on things that they published which were proper to publish, and that this report was one of the things he complained of, and, as I asked the Governor, if he didn't say that these reports were slanderous, and he said he probably did; he doesn't know just who it was [76] aimed at. I think that is proper.

The Court: Strictly speaking, in cross-examination we are not confined to strictly relevant matters, and it may be proper cross-examination.

Q. (By Mr. Faulkner): Now, Governor, have you had some controversy with the Empire over the Union Bank of Anchorage, didn't you, with some of their publications?

A. Well, I really don't recall what you would call a controversy. This was a matter that was handled at various times by the Banking Board and by the Legislature. I wouldn't say that I had any controversy with the Empire over that. I think, if you want an answer to your question as to why the Empire seemed to turn on me, I can give it to you, but it has nothing to do with the publications.

Q. Well, I want to find out if you didn't object

(Testimony of Ernest Gruening.)

to these publications and why, and, perhaps, the jury can form its own conclusions.

Mr. Nesbett: Your Honor, now we are going into another subject that seems to me to be entirely and completely collateral and irrelevant. How far are we going on this? The question of what the Governor may have done or said in his official capacity and in connection with the Union Bank has nothing to do with this suit at all. I don't know how Mr. Faulkner can possibly use it to rebut or offset any of the [77] Governor's testimony with respect to the bias of the Empire.

The Court: Well, I do not know either.

Mr. Faulkner: He said the policy of the Empire was one of animosity toward him, and I want to show if that didn't work both ways and that there were things that came up here of vital public interest that the Empire published and published editorials and comments on that were correct. The Governor has come on the stand here this morning and introduced a vast array of editorials and clippings from the paper, to show that they had animosity toward him, and I want to show what was the basis of their difference with him, to show it was not animosity at all. I have got a right to do that.

The Court: Counsel, yes. Can we not, however—can you not limit your inquiry, however, as to the attitude between the Governor and the paper rather than going into the merits of these collateral matters?

(Testimony of Ernest Gruening.)

Mr. Faulkner: I didn't do that.

The Court: Well, we did on this Palmer deal. Now, I would like to suggest we avoid such on these other deals. It is purely a waste of time.

Mr. Faulkner: I don't want to go too far into this and I think I have already buttoned up the Palmer thing. I wanted to bring out the question of whether the Governor was not angry himself at these publications which were justified by the Senate Report. [78]

The Court: Well, your inquiry may be proper along those lines; but, if you will kindly stay away from going into the issues, the collateral issues.

Mr. Faulkner: I haven't gone into anything in connection with the Union Bank except to ask a preliminary question.

The Court: Very well.

Mr. Faulkner: And I want to follow it up with one that is very pertinent.

Mr. Kay: Well, now, Your Honor, I take it that Mr. Faulkner then is finished with the discussion of the Palmer Airport, and I didn't hear one word about the Juneau Empire being critical or any demonstration in the Juneau Empire of criticism of the Palmer Airport situation.

The Court: Well, counsel, we are now on another subject. We are on the subject about something to do with the Union Bank, at which time the objection was made by Mr. Nesbett. We have ruled upon that objection. I think we are through with the airport.

(Testimony of Ernest Gruening.)

Mr. Kay: The whole point was, as Your Honor pointed out—we have no objection whatever if Mr. Faulkner can show that Governor Gruening was angry or bitter at the Empire because of its honest difference of opinions with him on the Palmer Airport, but no evidence was introduced of their opinion, so we don't know what it was. Maybe they approved it. [79]

The Court: Under the ruling of the Court he may answer the question if he may—if he can.

Q. (By Mr. Faulkner): Governor, you remember the trouble the Union Bank had at Anchorage in 1947?

A. I remember there was some trouble; yes.

Q. Do you remember an occasion when Doctor Walker, the Senator from Ketchikan, introduced a resolution in the Senate which was quite critical of the Bank and you, as Chairman of the Banking Board?

A. Well, I will be glad to take your word for it. I don't happen to remember it.

Q. You don't remember that?

A. No; but I think, if I refreshed my memory and it was there, I probably could recall it.

Q. Do you remember calling Mrs. Monsen and telling her not to publish that, that it would be libelous—if you remember it?

A. Well, I don't recall it, but, if you say I did, I—

Q. No. I am not—

Mr. Kay: Don't admit it, Governor.

(Testimony of Ernest Gruening.)

Q. I am not saying you did.

A. I don't recall that at all.

Q. I prefer to have somebody else say you did.

The Court: Counsel——

Mr. Faulkner: I didn't say he did. [80]

A. I don't recall it.

Mr. Faulkner: I just asked him a question.

Q. (By Mr. Faulkner): Now, Governor, do you remember in the fall of 1952, November, 1952, the steamship strike that tied up all the transportation here for a long time? A. I do.

Q. Do you remember where you were then?

A. Well, the strike lasted so long I probably was in several places.

Q. Well, weren't you in the States during part of that time?

A. During part of that strike, I am sure I was.

Q. And do you recall whether any other officials were in the States at that time?

A. Well, which ones?

Q. Well, the Commissioner of Labor, the Highway Engineer, the Tax Commissioner, the Attorney General, the Assistant Attorney General, and the head of the Price Administration—or Stabilization—whatever it was—Hanford.

A. Well, they may have been. Of course, you know the Governor has no jurisdiction over elected officials.

Q. You don't remember that. All right. Well, now, Governor, you yourself—I mean no offense by this question at all and no feeling about it—but you

(Testimony of Ernest Gruening.)

yourself made a good many speeches over the radio; you had no paper; but you had speeches over the radio and sometimes articles in the [81] papers that were quite critical; didn't you?      A. Of what?

Q. While you were Governor?

A. Critical of what?

Q. Well, to begin with, didn't you have a course of criticism toward what you called absentee capital or absentee ownership?

A. I criticized certain practices of some of the absentees.

Q. And you criticized the Alaska Steamship Company quite freely?      A. Yes, I did.

Q. And you criticized the Pan American Airways, didn't you?      A. Not that I can recall.

Q. And you criticized the Salmon Industry?

A. Yes.

Q. And did you ever criticize the mining industry?

A. Mining industry? I only recall criticizing the A. J.'s effort to collect \$250,000.00 for that rock which would have had to be dumped in the channel if it hadn't gone into the fill.

The Court: Again, counsel, may I inquire as to whether this is proper cross-examination?

Mr. Faulkner: Yes, Your Honor.

The Court: The witness testified, as I remember, Governor Gruening testified, that in his judgment criticisms [82] of public officials in the newspaper were perfectly proper as long as they were fair and honest; so where is there anything to cross-examine

(Testimony of Ernest Gruening.)

upon that point? The fact that he criticizes others, I cannot see where that is proper cross-examination.

Mr. Faulkner: Well, I think the jury ought to know that the Governor of a Territory is immune from prosecutions for his criticisms.

The Court: I will sustain objection to any such examination, and the jury will be instructed to disregard it.

Mr. Kay: I would be very much interested in——

The Court: I have ruled upon it, counsel.

Mr. Kay: ——the citation to that effect.

Mr. Faulkner: Well, I have got plenty. Your Honor, now I want to ask him if he didn't criticize over the radio the Empire.

The Court: Well, that is a different proposition.

A. Yes, I did.

Q. (By Mr. Faulkner): On many occasions?

A. No; not on many.

Q. Some?           A. On a few.

Mr. Faulkner: I think that is all. Pardon me just a minute, Your Honor. I want to see if there is anything else here. Oh, yes. [83]

Q. (By Mr. Faulkner): To go back to this ferry fund, were you familiar with the statutes of the Territory that provided how public money should be received and accounted for?

A. Well, yes, I would say so.

Q. And that they had to be turned over to the Territorial Treasurer?

A. Well, in this particular case the Attorney

(Testimony of Ernest Gruening.)

General, that you are referring to, and the past Attorney General, Mr. Roden, both declared that this was a perfectly proper legal proceeding.

Q. Well, did the Attorney General tell you that?

A. Well, it is my impression that he assented and he raised no objection.

Q. Governor, to refresh your memory, at the meeting of June 5, 1952, of the Board of Road Commissioners didn't the minutes simply show that the Attorney General made no objection?

A. Well, I think that is probably correct.

Q. There was no comment by him on whether it was right or wrong?

A. No; but by making no objection he would certainly make clear that he thought it not improper.

Q. Then, when he did write an opinion on it, didn't he state that the funds should be turned into the Treasurer as the [84] law directed and then a certain portion turned over to the Highway Engineer and that used for the operation of the ferry?

A. Well, I would think you would get a direct answer by asking the Treasurer himself. I am not positive as to that.

Q. Well, I was asking you if you knew of the Attorney General's opinion to that effect.

A. Well, really, I don't remember the exact details.

Q. Well, that is all right. But the law required at that time that all funds of every nature be turned over to the Treasurer?



(Testimony of Ernest Gruening.)

A. Well, that was not the opinion of the Attorney General's Office.

Q. But you knew what the law was, didn't you?

A. Well, this particular situation that had come up was not covered by existing statutes.

Q. Oh, it wasn't?

A. Not in my judgment, or not in his judgment, certainly.

Q. As a matter of fact, didn't you do this for expediency and convenience?

A. Well, I wouldn't say expediency and convenience. It was done in order to permit operation of an enterprise that was demanded by public interest.

Q. Well, was there any statute authorizing the operation of the ferry anyway? [85]

A. Well, it was considered part of the Highway Engineer's and the Road Board's functions to extend the highway system, and throughout the United States, as you know, you have ferries that are complimentary or supplementary to highways. You go to a certain point and you can either go by highway or you can go by ferry. In this particular case there was no alternative of connecting the highway system in the Interior except by ferry. You couldn't go from Juneau to Haines by road because you would have to cross Lynn Canal, and there was no bridge, so this was merely an extension of the highway system.

Q. Wouldn't the same thing apply to Ketchikan?

A. Yes; it would if it had been necessary.

Q. You have no ferry to Ketchikan?

(Testimony of Ernest Gruening.)

A. No. It was contemplated.

Q. As a matter of fact, it was——

Mr. Nesbett: What was the last answer?

A. There was no ferry to Ketchikan but it was contemplated.

Q. (By Mr. Faulkner): Now, Governor, you felt that it was an expedient and convenient way to handle the ferry funds in the way they were handled? A. Yes.

Q. And you know now you had no requirement for bond from the man who handled the fund, that you know of?

A. Well, that is an entirely different question. [86]

Q. Yes. I mean, you don't know of any, do you?

A. I do not know whether a bond was required.

Q. And you don't know whether there were some losses in the handling of those funds?

A. I do not.

Q. You don't know whether there were irregularities in the whole operation? A. I do not.

Mr. Faulkner: I think that is all.

### Redirect Examination

By Mr. Kay:

Q. Governor, with regard to that, do you recall seeing a short three-page report of the Arthur Anderson Company with regard to the operation of the ferry? I don't know whether you have seen it or not. Do you recall seeing it?

A. I don't recall seeing it.

(Testimony of Ernest Gruening.)

Q. So then, if such a report exists, you simply do not know what its contents are?

A. I do not know and I do not recall seeing it.

Q. Was it ever reported to you by anyone or by any of the other members of the Board of Highway Commissioners that that fund was short?

A. No. [87]

Q. Or that there were any deficiencies or discrepancies in the financial statement of the fund?

A. No; it was never reported to me.

Q. You don't know whether the fund may have turned out short or long?

A. That is correct.

Q. Mr. Faulkner asked you if you had been critical of the Empire on occasion in your radio or other public addresses, and, I believe, you replied that you had been. Is that correct?

A. On one or two occasions at the most.

Q. On any of those occasions, Governor, did you attack the, ever attack the motives or actions of the publishers of the Daily Empire in a slanderous or libelous manner in any way comparable with the front page of September 25, 1952, sir?

Mr. Faulkner: I object to that as——

A. Certainly not.

The Court: Just a moment.

Mr. Faulkner: ——calling for a conclusion.

The Court: Yes; the question is objectionable as calling for a conclusion and, I think, leading.

Mr. Kay: I think the witness can suggest a conclusion.

The Court: Well, you may ask whether he at-

(Testimony of Ernest Gruening.)

tacked [88] the motives—the first part of the question is proper—whether he attacked the motive or the honesty or integrity of the paper.

Mr. Kay: You are correct, Your Honor.

Q. (By Mr. Kay): Governor, did you at any time attack the integrity or the policy of the Alaska Daily Empire?

A. No. To the best of my recollection, in going back to Mr. Faulkner's query whether I had made several or more attacks on the Empire, I at this time can recall only one, and you may be able to remind me of others, but I can recall only one and that was in connection with this deleted statement, which had been issued by me and three other public officials, on the closing of the Alaska Juneau Mine which was for the purpose of calling attention to the fact that several employees were suddenly unemployed and that we wanted as far as possible to attract as much attention as we could to their state of unemployment so that they could get employment, and my criticism followed a warning to the editor at that time, Mr. Carter, that, if they did not print the statement in full, as he said they would not, and deleted certain sentences which would alter the meaning, that I would then be obliged to go on the air and read to the people of Juneau just what the original statement was so that people could find out what had been said and what had [89] been deleted, and that, I think, was the only extent of my criticism. It was really a factual report to the people. Now, you may recall other ex-

(Testimony of Ernest Gruening.)

amples of criticism, but I don't recall them, and they certainly were never on any basis of attack of the character of the Empire or its owners or anything of that kind. It was simply a report to the people when we felt we had been shut out of the opportunity of saying what we needed to say through the recognized medium of publicity, namely, the press.

Q. Would the same be true in general, Governor, concerning any other speeches which you may have made critical of the persons or institutions which Mr. Faulkner mentioned—the Alaska Steamship Company or the Salmon Industry?

A. Well, yes. I criticized the rate increases being imposed on the people of Alaska without hearings, without proper audit to ascertain whether those heavy burdens imposed on the people were necessary, and I criticized the Salmon Industry for some of its political interference in our legislation, its opposition to many measures which I considered desirable, and some of its other policies, particularly in relation to fish traps.

Q. With regard to these other matters which Mr. Faulkner mentioned, and I will mention particularly the Palmer Airport, for example, were you in any way publicly, so far as you can recall, critical of the Empire for its— [90] or did you deny the Empire at any time its right to freely criticize on a basis of honest disagreement of the paper on any subject, including the Palmer Airport?

A. Not that I can recall. I felt that the treat-

(Testimony of Ernest Gruening.)

ment accorded the Palmer Airport by the Empire was a very unfair one because all through was the implication, as in this case, of personal gain, corruption, whereas the only effort on the part of the officials in charge, who were guided by the C.A.A. officials, was to try to get something done quickly for the Territory of Alaska.

Q. Now, you mentioned C.A.A. officials. Are those officials of the Territory of Alaska, Governor, responsible in any way to the Governor or any of the Territorial officials?

A. No, they are not. They are Federal officials and not responsible to me, the Governor, or to anyone else.

Q. That is the Civil Aeronautics Administration?      A. Civil Aeronautics Administration.

Q. Which is a branch of the Department of Commerce of the Federal Government?

A. That is correct.

Q. And those were the people with whom Territorial officials, the Aeronautics Board and others dealt in the financing of the Palmer Airport; is that correct?

A. That is correct. And they were the people who, presumably, had the expert knowledge on this subject. It was [91] a new field to us. We had never before engaged in airport construction with Federal matching.

Q. Do you have any recollection of the Empire publishing any report concerning the Union Bank,

(Testimony of Ernest Gruening.)

or of disagreeing with the Empire concerning anything that they may have published, if they did publish anything—I don't know that they did—in connection with this report concerning the Union Bank?      A. Well, I really don't recall that.

Q. You don't?

A. No, I really don't recall that episode. I mean, of course, the papers have to be very careful what they publish about banks anyhow. There is always the risk of their causing a run on a bank and so forth.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Ernest Gruening resumed the witness stand, and the Redirect Examination by Mr. Kay was continued as follows:)

Q. Governor, I should have asked you probably at some point—Mr. Roden has reminded me to ask you several times—for the benefit of some of the jury who may not be clear on the point, in connection with one of those exhibits—there was a letter from one Harold Ickes—who was Mr. Ickes at that time? [92]

A. He was the Secretary of the Interior and my superior, under the system that exists while we are a Territory.

Q. Now, Mr. Faulkner mentioned or asked you concerning an editorial appearing in the Anchorage Times following the publication of the Alaska Daily Empire of September 25, 1952, and he also

(Testimony of Ernest Gruening.)

asked you concerning the fact that friends had raised money for a car upon the expiration of your final term as Governor. Do you have—do you know how many persons or members of the public—do you have any way of estimating—who might have previously supported you, or at least have been neutral on the subject, changed their opinion as a result of the publication of September 25, 1952?

A. No. I have no way of calculating that.

Q. Then it is still your feeling that as a result of this publication your personal reputation and your reputation as a public official was damaged?

A. Well, I haven't any doubt about it.

Mr. Kay: I believe that is all.

#### Recross-Examination

By Mr. Faulkner:

Mr. Faulkner: If the Court please, there is one other question that I would like to ask the witness. I think I asked it, but I want to ask it now, having a little more [93] specific information, and he may be able to answer it and he may not, but it is really on cross-examination and not on recross.

The Court: Well, I presume no objection will be made on that score.

Q. (By Mr. Faulkner): Governor, I asked you if you had referred to the Palmer Airport Report of the Senate as slander, and I will now revise that and ask if you remember on August 17, 1950, that you gave a news item to the Empire in which they



(Testimony of Ernest Gruening.)

said that—in which you said that this reference of Butler to Stanley McCutcheon and others was slander. Do you recall that? I have the paper here but——

A. I don't recall it but I may have said it. I would say—if I may amplify what I want to say?

Q. Yes.

A. Knowing and being profoundly convinced that nobody engaged in that transaction stood to profit or profited by it personally, and that their only desire was to help the Territory, that any such accusation or implication was of a slanderous nature, and that was my objection to some of the editorials that were published at the time. Any searching examination would have revealed that no one stood to profit, no one made any benefit out of it, and, if they had, they certainly should have been [94] prosecuted; but that was the implication that was given in a lot of the newspaper publications, that someone somehow had benefited by it.

Q. Governor, just one more question. You had some differences, when you were Governor, with people and organizations and institutions who didn't agree with you on some policies, didn't you?

A. Well, I imagine that would happen.

Q. And you were quite insistent on having your way; you felt that your view was the right one?

A. Sometimes; and sometimes not.

Q. Mostly. Well, do you remember—I think this question is proper, but there is no hard feelings about it—do you remember one time when you set

(Testimony of Ernest Gruening.)

the F.B.I. after Ed Medley and Captain Lathrop and myself and some others there in Juneau because we didn't agree with you in legislation that you proposed?

A. I don't recall having anything to do with the F.B.I., but I do recall taking up with the United States Attorney the question of whether there had been violation of the lobbying statute in the Legislature, which specifically provided that lobbyists would have to register, and of course, as you know, there are a lot of people around Juneau at the time of Legislature who lobby but they don't register, and that was, I think, [95] probably——

Q. That is what the F.B.I. were doing; and you never did see the report, I suppose?

A. No. I know that Cap Lathrop told me very frankly that he had sent Jack Clauson down as a lobbyist, that he had paid Jack Clauson's expenses but the Canned Salmon Industry paid his costs in Juneau.

Mr. Kay: Are you through?

Mr. Faulkner: No.

Q. (By Mr. Faulkner): Well, you included some others in that, didn't you?

A. Well, I think I asked that the whole subject be looked into.

Q. I had forgotten about it until yesterday. It just occurred to me.

Mr. Faulkner: Yes, that is all.

(Testimony of Ernest Gruening.)

Redirect Examination

By Mr. Kay:

Q. Governor, was it your conception that this was one of your duties as Governor to see to the enforcement of the laws of the Territory?

A. Certainly; certainly it was.

Q. And call any violations or apparent violations—

A. Certainly it was my duty. In fact it is prescribed [96] somewhere in the statutes that the Governor should be responsible for the enforcement of the laws.

Q. Governor, you were queried at the commencement of your cross-examination for some time by Mr. Faulkner as to possible motives for the animosity or the change in attitude of the Empire between the time you came to Alaska, when they apparently welcomed you with open arms, and the attitude which they evidenced, according to your testimony, over a period of years during the latter years of your presence in Alaska, and I believe you offered to give your opinion several times as to the basis for that animosity, but, apparently, there was no desire to learn it; is that correct?

A. That is correct.

Q. I wonder if you would now state what your honest opinion is as to the point, the event, which led to the change in attitude, as far as you could detect, on the part of the publisher of the Empire?

(Testimony of Ernest Gruening.)

A. Well, I rather hesitate to open up this subject, but I think that the change in the Empire's attitude certainly was related to this circumstance, and that is—somewhere in the early forties shortly after Governor Troy had died, a check came into my office from the McMillan Company, which is a publishing house in New York, for royalties on the "Guide to Alaska," which was a book [97] published two years previously and the contract for which had been signed by my predecessor, Governor Troy, I think in July of '39, and, naturally, this raised the question as to where the other royalties had been, because, obviously, this check came into my office by accident because it was addressed to Governor Troy and it was opened there, and it appeared that these royalties had been collected and paid to the late John Troy and after his death to the Troy estate, which of course they should not have been.

It was an inadvertence on the part of somebody, because those funds belonged to the Federal Government and belonged to the Treasurer of the United States, and, naturally, it was my duty to report that, and, as a result of that, a demand was made on the Troy estate, I think on the attorney of the Troy estate, Mr. Faulkner, to refund this money which had been collected over several years amounting to some thousands of dollars. I think the thing was handled for the Government by United States Attorney Pat Gilmore who made a request on the Troy estate that these monies be refunded.

(Testimony of Ernest Gruening.)

Of course I had no alternative in the matter. It was my duty to report this. Those were funds belonging to the Federal Government which, inadvertently, had passed into private hands, and I believe they were then, [98] after action by the Department of Justice, refunded. And I think that had a considerable bearing on the increased hostility of the Empire to me.

Q. There was a change in attitude toward you?

A. There was a very definite change.

Q. From that point on.

Mr. Kay: I believe that is all.

#### Recross-Examination

By Mr. Faulkner:

Q. Governor, in investigating whether anybody appeared before the Legislature without registering, did you report to the F.B.I. anybody there who agreed with you?      A. Who agreed with me?

Q. Yes. Do you recall?

A. I can't recall any lobbyists who agreed with me.

Q. You can't. Well, wasn't the place swarming with them?      A. What?

Q. Wasn't the place swarming with them, dozens of them there?

A. I can't recall any lobbyists at that time that agreed with me. I thought they were all representing the Canned Salmon Industry and the mining industry and——

(Testimony of Ernest Gruening.)

Q. Well, you didn't look into that very closely. Now, Governor, about these checks from the McMillan Company, [99] when did you say you got a check?

A. Well, I can't remember the exact date, but I think it was somewhere around '42 or '43, in there.

Q. '44? A. It may be.

Q. Well, let me see is this a fact. When Governor Troy was Governor, he sponsored a book; isn't that true? A. Yes; in his official capacity.

Q. Which was put out by the W.P.A.?

A. Yes.

Q. And after he died a check came payable to him from McMillan Company, the publisher; is that right?

A. I think that is the way it was made out.

Q. Well, then the next year another check came to the Troy estate. Do you know anything about it?

A. I can only recall one——

Q. I mean—do you remember anything about it?

A. I can recall one check that came in which——

Q. Came where; from where?

A. Well, it came from McMillan Company.

Q. To whom?

A. It came to the Governor's Office.

Q. Well, who was it payable to?

A. It was payable to John Troy.

Q. What did you do with it? [100]

A. I turned it over to the Department, called their attention to it.

Q. When was that?

(Testimony of Ernest Gruening.)

A. Well, about this time.

Q. Then what did the Department do about it?

A. Well, I think they instituted proceedings. I think they communicated with you as the counsel for the Troy estate.

Q. Governor, aren't you very much mistaken about that? Didn't the Department begin to send you checks after the whole Troy matter had been cleared up?

A. Oh, no.

Q. Well, then how did it happen that McMillan Company sent a check to John W. Troy the year he died?

A. I don't know. Perhaps they didn't know he had died.

Q. How did they happen to send a check the next year?

A. I don't know.

Q. You don't know whether that is a fact or not?

A. No. I do know it is a fact that the money belonged to the Federal Government and that it was ultimately deposited in the Treasury.

Q. Yes. We concede that. Isn't it a fact though, Governor, to refresh your memory, that two checks came into the Troy estate to John W. Troy from McMillan, and an inquiry was made as to what these checks represented, and they said royalties on a book, and then later on the [101] office—I don't know what it was—that General Fleming was head of—I don't remember—wrote and said that this money should have gone to the Government because he had acted in an official capacity in arranging for these royalties, and we asked them for the contract,

(Testimony of Ernest Gruening.)

and they couldn't find it; they never did find it: they never did give it to us; but, when we found it at McMillan's, it was a contract made not with any official but with John W. Troy, and they had made it out wrong. Do you remember that? You said "inadvertently."

Q. Well, I think it was undoubtedly inadvertence somewhere.

Q. Yes; inadvertence. And the money was refunded to McMillan Company where it came from; and it was McMillan's duty to send it into the Government if they made out their contract right?

A. Well, I knew it was refunded after it had been called to their attention.

Q. And it didn't belong to the Troy estate, and nobody ever claimed it did, and it was sent back to McMillan, and they in turn after a year or two, when they got the proper contract, paid it over to the Government, and they withheld it and wouldn't pay it over until the Government agreed to change this contract from John W. Troy personally to the Governor of Alaska. Isn't that the way it happened? [102]

A. Well, I didn't follow it beyond that point.

Q. No.

A. I think former United States Attorney Gilmore could probably give the correct answer as to just what followed.

Q. Well, I don't think he knows much about it, excepting that they sent him a claim to file against the estate.



Mr. Faulkner: I think that is all.

Mr. Kay: I believe that is all.

The Court: That is all then.

(Witness excused.)

Mr. Kay: At this time, Your Honor, it is our intention to offer in evidence the deposition of John E. Small given at Anchorage, Alaska, on April 15, 1955, and, in order to do that in the manner which we think most proper, I am going to take the witness stand, as would Mr. Small, and read Mr. Small's responses, and Mr. Nesbett will read the questions to me. We will pause after each question to give Mr. Faulkner an opportunity to object if he cares to do so.

The Court: That is quite proper. If there be no objection, you may omit the formal parts. Is this deposition taken pursuant to stipulation or notice or which?

Mr. Faulkner: I think so.

Mr. Kay: Yes, it was.

The Court: You would not find it necessary to read the formal parts? [103]

Mr. Kay: The stipulation is attached to the original deposition.

Mr. Faulkner: Would not find it necessary to what?

The Court: You would not find it necessary to read the formal parts?

Mr. Faulkner: Oh, no; no.

The Court: You may omit that.

Mr. Kay: At this point I am acting as John

E. Small and no longer Wendell Kay; I am John Small in answering these questions for Mr. Nesbett.

Mr. Nesbett: This deposition was taken at the request of the plaintiffs in Anchorage, Alaska, and is the deposition of John E. Small, formerly an employee of the Empire Printing Company, the defendant in this case. Appearances as attorneys were Buell A. Nesbett, Attorney for Plaintiffs, and John E. Manders, of Attorneys for Defendant for the purpose of this deposition only. "John E. Small being first duly sworn upon oath, deposes as follows: By Mr. Nesbett:"

(Whereupon, the deposition of John E. Small was read as follows—questions by Mr. Nesbett and answers by Mr. Kay:)

(Reading.)

#### DEPOSITION OF JOHN E. SMALL

Q. What is your full name?

A. John E. Small.

Q. S-m-a-l-l? [104]                      A. Yes.

Q. And are you residing in Anchorage at the present time, Mr. Small?                      A. Yes, I am.

Q. And are you employed here?                      A. Yes.

Q. What is your occupation, sir?

A. I am a reporter for the Anchorage Times.

Q. I will ask you whether or not you were employed at one time by the Empire Printing Company, publishers of the Alaska Daily Empire?

A. Yes, I was.

(Deposition of John E. Small.)

Q. Can you state the dates during which you were or between which you were employed there?

A. From March 1, 1952, to approximately the end of February, 1953.

Q. And in what capacity were you employed by the Empire Printing Company, sir?

A. As the Police and Courthouse reporter.

Q. You are speaking—

A. It is the Police and Federal Building Reporter.

Q. And what were your duties in general with respect to that assignment, Mr. Small?

A. Well, I reported news as it developed in the police beats and in the Federal Building. [105]

Q. Were you employed on newspapers prior to coming to work for the Empire Printing Company?

A. Yes, I was.

Q. Can you state the dates and where you were employed roughly?

A. I worked for the Hastings Nebraska Tribune from March, 1943, to the end of December, 1946, as police reporter and later as wire editor. I worked for the Minot, North Dakota, News from the date after quitting the Tribune until January, 1948, as wire editor. I worked as editor of the Union Newspaper in Denver, Colorado; the Denver Police and Fire Journal as official newspaper for the Police Department and Fire Department from '48 until—well, into the summer of that same year. I operated a weekly newspaper in Eatenville, Washington. I don't know the date, but it was for a

(Deposition of John E. Small.)

period of approximately 6 months and during the illness of the owner, and I operated a weekly newspaper in Columbus, North Dakota. I don't recall the exact date on that either, but for a period of about 4 or 5 months, and from there I moved up to the Empire.

Q. Had you resided in Alaska for any period of time prior to going to work for the Empire?

A. I had been up here once before on a fishing boat and that is all. [106]

Q. Were you familiar with Alaskan politics at the time you went to work for the Empire?

A. No.

Q. I will ask you whether or not—strike that—when you worked for the Empire, Mr. Small, who was the managing editor?

A. Jack McFarland.

Q. And who was in over-all charge of the Empire?

A. Well, other than the acting charge was James Beard.

Q. And what was his title?

A. That was rather ambiguous around there. Nobody seemed to know. He actually held the position we ordinarily know of as business manager, but he also wrote editorials and generally oversaw the operation of the entire plant.

Q. Did Mrs. Helen Monsen hold any office or take any part in the operation of the Empire?

A. As publisher.

Q. I will ask you whether or not Mr. Beard,

(Deposition of John E. Small.)

after you had commenced to work for the Empire, gave you any expressions of Empire policy with respect to the Democratic administration as far as reporting and publishing of the Empire was concerned? A. Yes, he did.

Q. What were they?

A. Well, generally he told me over a period of time, [107] beginning with the Sunday that I arrived there, that there was a Gruening machine in existence in Alaska and that the Empire was opposed to him and was doing all within their power to drive the machine out of power and that part of my job would be to help them in this respect as a reporter; that any information I came across it was part of my duty to report that.

Q. I will ask you whether or not Helen Monsen, as publisher, gave you any similar information or instructions?

A. She never gave me any instructions, but on numerous occasions she did express antagonism against Governor Gruening and against what she called the Gruening machine.

Q. Now, I will ask you whether or not Mr. Beard or Mrs. Monsen ever expressed to you a desire to "get something" on Gruening or his administrative officials?

A. Helen has never asked me to do anything like that. Beard on several occasions, not specifically to me, but to the editorial staff in general has indicated we should do that.

(Deposition of John E. Small.)

Q. Now, as your period of residence in Alaska increased did you acquire some independent picture of the political situation?

A. Yes, I did. As I said, at the time I came there and during the tenure of my employ there I was constantly bombarded with statements to the effect that the Gruening [108] machine was full of graft, corruption and that we should do everything within our power to drive them out of power and, of course, I had no basis for knowing whether that was a true picture or not when I came there. As time went on and I covered my beats and talked to people with other points of view I learned that some people thought that the term "graft and corruption" could more properly be applied to the Empire and very frequently they suggested it could be applied to me as an employee of the Empire and I found considerable temperament, that attitude around town.

Q. Mr. Small, can you state from your experience in newspaper work whether or not the editorial and news reporting policy of the Empire, with respect to Gruening and his administration, was distorted?

A. My opinion was that it was about the most distorted news reporting, if you can use that term, that I have ever come across.

Q. Now, calling your attention to the evening of September 24, 1952, Mr. Small, I will ask you whether or not you had occasion to visit the news-room of the Daily Alaska Empire?

(Deposition of John E. Small.)

A. Well, I don't recall the date offhand. I didn't have it in any of my notes, but if you are referring to the paper that involved—to the edition that is involved [109] in this liable action, yes.

Q. Then is it your testimony that you did have occasion to visit the Empire newsroom the evening before the publication of the edition involved in this action? A. Yes.

Q. Can you state about what time you went to the newsroom?

A. No, I can't except it was after dark.

Q. And who was in the newsroom when you went there? A. Jack Daum and Jim Beard.

Q. And what was Mr. Daum's position with the Empire, Mr. Small?

A. He was a reporter. He took over from me as Federal Building reporter.

Q. I will show you this newspaper and ask you if you can recognize it? A. Yes, I do.

Q. And describe it for the purpose of the record?

A. It is "The Daily Alaska Empire," September 25, 1952, edition that carries what we call the "scare head" stating that the Special Ferry Fund has been bared and containing such headlines as "Reeve Raps Graft, Corruption" and "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account," and other similar scare heads.

Q. You were working at the Empire when that edition was published, weren't you? [110]

A. Yes, I was.

(Deposition of John E. Small.)

Q. Do you recognize that as the September 25th edition of the Empire?

A. I recognize it as an edition that was published at the time I worked there.

Q. It states September 25 in the heading, doesn't it?      A. Yes.

Mr. Nesbett: This copy will be attached to the original of the deposition and marked Exhibit A.

Q. (By Mr. Nesbett): Now, I will ask you whether or not you saw the news makeup represented by the front page of this edition dated September 25, on the evening you visited the newsroom?

A. Yes, I did. I saw what we call a page proof of it.

Q. You call it what?      A. Page proof.

Q. What is a page proof, Mr. Small?

A. Well, that is a proof of the type that is run off for the purpose of checking the type for errors.

Q. Then is it true that a page proof would be as easily read as this?

A. It would be practically exactly like that.

Q. As Exhibit A that we have here?

A. Yes.

Q. Did you have any discussion—what did you do when you [111] entered the room?

A. I don't recall exactly. I was coming in, as was my custom, to do work that I hadn't gotten done earlier in the day and I think, if I recall, that I was at my typewriter for awhile and shortly after that I noticed Beard and Daum reading this page proof over at the managing editor's desk and I walked



(Deposition of John E. Small.)

over to see what they were discussing and what they were doing.

Q. I will ask you whether or not you had any discussion with Mr. Beard concerning this page proof?      A. Yes, I did.

Q. What was that discussion?

A. Well, immediately after looking at it Beard turned to me and said, "What do you think of this," or words to that effect, not a direct quote, and after glancing over it I told him that it looked like he had a libelous makeup.

Q. Now, when Mr. Beard said, "What do you think of this," did he say anything else prior to your reading it?

A. Well, he made several comments and the one I recall, of course, is "We have got the S.O.B. where we want him," or something to that effect.

Q. Did you make any immediate reply to that comment?

A. I don't think I made any immediate reply. I read the proof over pretty thoroughly, they were working on it continually during that time and I read both the lead [112] story and that front page editorial and I told them that I thought both of them were libelous in themselves.

Q. Did Mr. Beard make any statement in connection with your remark?

A. He probably did, but I don't recall exactly any statement he made now, except that he generally—well, discounted any suggestions I had as to libelhood. And I might also say that Daum did the same

(Deposition of John E. Small.)

thing. Daum and I had a brief argument, he stated there was no libel in it; and, I recall I pointed out to Beard that he had in the makeup heads such as that, "Reeve Raps Graft, Corruption" alongside heads about Special Ferry Fund being discovered or bared and that he was using color words which had connotations of graft and corruption and that the placement of his information in his lead story would indicate to a reader that corruption was involved or graft and specifically in the editorial there was reference to Oscar Olson which attempted to point out a correlation between the 2 cases. I told him that was definitely libelous and they told me that it was not.

Q. Did you notice anything unusual in Mr. Beard's tone of voice when he made the remark "I guess we have got the S.O.B. where we want him" or words to that effect?

A. Yes, Beard was a very demonstrative sort of person and there was obvious satisfaction, you might say even glee, [113] in his manner and in his tone of voice when he made the statement. He was very elated that night.

Q. Mr. Small, do you know of any rivalry that existed between Mr. Beard and Governor Gruening with respect to Mr. Beard's political ambitions?

A. Other than the obvious ambition to be in politically with the party that ousted Gruening, the only definite thing I know of is a statement he made one time that it looked like he might be on the way to the Governor's chair.

(Deposition of John E. Small.)

Q. That who might be on the way to the Governor's chair?

A. That Beard might be on the way. That occurred quite some time after this thing, after the election in fact, and Elmer Friend, who was then acting as managing editor, and Beard and I were riding in a cab——

Mr. Manders: Just a minute. This was all subsequent to the publication of the article, this last——

A. Yes. He, Beard and I were riding in a cab and he made the statement at that time he might be on the way to the Governor's chair or it looked like he might be. That is the only reference he ever made to me personally of ambitions to political office.

Q. Did you state previously that Mr. McFarland was managing editor when you went to work for the Empire?      A. Yes, he was.

Q. I will ask you whether or not Mr. McFarland was employed [114] as managing editor, in any capacity at the Empire on September 25, 1952?

A. No, he wasn't.

Q. Do you know whether or not Mr. McFarland quit the Empire or was fired?

A. That was a moot point. James Beard, I have heard him state—in fact James Beard told me the day that McFarland, to my knowledge quit, that he had fired him, but his severance with the Empire occurred as a result of an argument over a news story. I don't recall the story which they wanted

(Deposition of John E. Small.)

him to publish and he as managing editor refused to do so.

Q. When you say they wanted him to publish, whom do you have in mind?

A. Helen Munson and Jim Beard.

Mr. Manders: Has this story that you refer to have anything to do with the basis of this libelous suit?

Mr. Nesbett: I can answer, John. It hasn't, but it is strictly admissible as indicating the previous attitude. You see we have alleged in our Complaint a "campaign," it is called, to discredit by distortion and so forth.

Q. (By Mr. Nesbett): When you say they wanted McFarland to publish the story who do you have in mind?

A. James Beard and Helen Munson. [115]

Q. Do you know the nature of the story that Mr. McFarland refused to publish?

A. No, I don't know specifically and I don't even know generally except that practically all the arguments—in fact, I would say all of the arguments that occurred between McFarland and Beard, and usually that included Helen, concerned editorial policy that referred to a story about either Governor Gruening or some member of the Gruening administration, and I am quite sure that that story did have something to do with that. I am saying that I know that. I heard McFarland arguing and telling those people in the office, the words were very loud and I could hear them from Helen's of-

(Deposition of John E. Small.)

He went into the newsroom, McFarland told them they could have their job and their paper and he was going, and he subsequently went.

Q. Do you recall overhearing any conversation concerning this publication of September 25 on the day of the publication in the Empire offices?

A. Yes, I do.

Q. And was that conversation between Helen Munson, Beard and—

A. Originally the conversation was between Helen Munson and Jim Beard. That occurred in Helen's office.

Q. And were you there? [116]

A. I walked in the office for some business purpose, I don't recall what it was, and they were discussing this at that time.

Q. What was that discussion?

A. It referred, of course, to this paper and whether or not the Empire was in for a libel suit and Helen apparently had already been told by enough people that it impressed her because she was very worried that it was a libelous edition and Beard was telling her that they had nothing to fear—

(Reading suspended.)

Mr. Kay: Apparently meaning "fear."

(Reading resumed.)

—and that if they just stuck firm that there was nothing anybody could prove. He also told Helen

(Deposition of John E. Small.)

that if—the thing about this is that during that conversation there was a telephone call and the voice was later identified as that of the Empire Attorney, Faulkner, and the man wanted to know “Who in the hell’s idea it was to put that out,” or something to that effect.

Q. Did you hear that voice say words to that effect?      A. Yes, I did—very loud.

Q. To whom were the words spoken?

A. Helen answered the telephone.

Q. Did Helen say anything further to this attorney over the [117] phone?

A. There was conversation and Helen asked him whether or not it was libelous and he told her it was.

Q. Did he use exactly those words?

A. No, that is not a direct quote. I just recall he informed her that they had a possible libel suit on their hands.

Q. Just to refresh your memory, and I am looking at my notes, did the attorney say or did Helen Munson quote him as having said, “It was libelous as hell?”

Mr. Manders: Just a moment. I don’t mind you asking the question, but I do object to the leading of the witness.

Mr. Nesbett: It was a matter of refreshing his memory from notes here. Well, you can object to it at the time of the trial.

Q. Does that—

A. Well, he possibly said that sometime, but I

(Deposition of John E. Small.)

don't recall exactly that except that it was very strongly worded. It left me with the impression that Faulkner felt that the Empire had committed a libel.

Q. Mr. Small, do you have any interest in the outcome of this suit in any fashion?

A. No, I don't.

Q. I will ask you whether or not you overheard any conversation between Beard and others concerning this publication [118] of September 25?

A. Will you repeat that, please?

(Thereupon, the last question was read by the reporter.)

A. Yes, I know I did. I don't recall any exact words, but I recall overhearing Daum and Beard talking about it.

Q. I will ask you whether or not you overheard Beard discussing this publication with Ed Coffey and in your presence?

A. This case?

Q. This publication?

A. No, I did not.

Q. Well, I will ask you whether or not you overheard any conversation at all between Beard and Ed Coffey subsequent to this publication and concerning it?

A. Not subsequent to it, no, and not in reference to this publication.

Q. Did you overhear any conversation between Beard and Ed Coffey concerning the editorial policy and news reporting policy of the Empire as to the Gruening administration?

A. I was a target of some conversation at one

(Deposition of John E. Small.)

time between Coffey—or directed at me by Coffey and Jim Beard about a month or so after I started working for the Empire.

Q. And what was the nature of that target directed towards you?

A. It was explained—— [119]

Mr. Manders: Just a minute. He said one month after he started to work for the Empire which would put him in about the month of April, 1952, and this publication didn't take place until 1953, is that right?

Mr. Nesbett: September of '52.

Mr. Manders: Some 6 months or 5 months later and it is objected to as being too remote to connect this editorial with such conversation.

Q. (By Mr. Nesbett): What was that conversation, Mr. Small?

A. It was an explanation, forceful explanation, I might say, by both men of the political situation in Alaska and I was informed that there were 2 sides and that the Empire was on one and the Gruening machine was on the other and it concluded with the remark that I recall today because it prejudiced me against Ed Coffey to the effect that a smart boy would know which side of his bread is buttered, or words to that effect. In other words, if I played ball with the right people I would get somewhere and if I didn't I would get nowhere. That was the effect.

Q. Now, Mr. Small, do you recall overhearing any conversation between Mr. Beard and another



(Deposition of John E. Small.)

person in Mr. Beard's apartment after this publication of September 25?

(Reading suspended.)

Mr. Nesbett: They mean '52 no doubt. [120]

(Reading resumed.)

A. Yes, I do.

Q. State the circumstances and the nature of that conversation?

A. Well, I don't recall the time. I recall it was quite late at night and I don't even recall the business I had for going up, but I was heading up for another apartment and as I passed Jim Beard's apartment I heard loud voices and I stopped and listened. I overheard some conversation that didn't mean much to me except they were discussing this.

Q. This what? A. This publication.

Q. Of September 25?

A. Yes. This was several weeks after this was published and the voices were loud and angry and the statement that I recall clearly was Jim Beard's threat to some—whoever was in the apartment that if he mentioned or published or made public some letter that Beard would kill him.

Q. Did you hear anything further on that occasion?

A. I probably did, but I don't recall it now.

Q. Are you certain that their argument or heated discussion was concerning this publication of September 25, however?

(Deposition of John E. Small.)

A. Well, I am certain part of it concerned that because [121] that was mentioned, but I don't know whether it all concerned that.

Q. Now, can you state whether or not Governor Gruening's reputation was injured by reason of this publication of September 25?

A. I would say it was not permanently, perhaps, but it was, at least to my knowledge, it was hurt for the period aimed at by the Empire and that was the election period coming up in November.

Q. Can you state whether or not the reputation of Henry Roden was damaged by reason of this publication of September 25?

A. Well, Henry Roden appeared, from the information I gathered in my time in Juneau, to have a very high reputation in the Territory and especially in Juneau and most of the conversations I heard were directed at me expressed sorrow that Henry had gotten himself mixed up in a thing like this.

Q. Can you state whether or not the reputation of Frank Metcalf was damaged by reason of this publication of September 25?

A. I can only state that it is my opinion that it was.

Mr. Nesbett: That is all.

By Mr. Manders:

(Reading suspended.)

Mr. Nesbett: Do you want to read that?

Mr. Faulkner: It doesn't matter, unless you want me to.

(Deposition of John E. Small.)

(Reading resumed.)

Q. Mr. Small, you say you are now employed by the Anchorage Times? A. Yes, I am.

Q. And how long have you been employed by them? A. Since March 1st, 1953.

Q. 1953? A. Yes.

Q. Was that right after you left the Empire?

A. Yes, that was the day after.

Q. You mentioned a number of papers for whom you worked? A. Yes.

Q. When you left those papers did you leave of your own accord in each instance?

A. Yes, I did.

Q. And then you published papers of your own?

A. Not of my own. I have published papers as editor. I have published 3 weekly newspapers, that is, 3 periodicals for other owners.

Q. And when you left those papers what was the reason?

A. In one instance a union newspaper; I quit partially [123] because I wasn't in a type of position that was paying me enough money; and for the other reason that my wife and I wanted to move to the West Coast. The other two were taken as part-time jobs—not part-time jobs, but as temporary jobs and in one instance to do a favor for a friend, that was at Eatenville, and in the other instance to help out a man who asked me to go out and do some trouble shooting for him. Incidentally,

(Deposition of John E. Small.)

I have letters of reference from all my former employers.

Q. Let me ask you this, Mr. Small: You have testified that you were not familiar with Alaskan politics at the time you came up here? A. Yes.

Q. Now, on the papers you had previously worked on or managed isn't it a fact that most newspapers take a side one way or the other in political matters?

A. That depends on what you mean. Are you talking about politics generally or on specific issues?

Q. Different machines, let's say, as they are commonly known. One group opposed to another.

A. Not always, no.

Q. Did you work on newspapers that took one side as opposed to another?

A. If I may I will answer that this way: I have worked on a paper that was Republican, which favored Republican [124] policies in general.

Q. Papers and the policies of those papers do those things, do they not?

A. Some newspapers do, some don't.

Q. This Jack McFarland you mentioned, what does he do now?

A. I understand he is teaching school in Kake or one of those little villages down in Southeast Alaska.

Q. Is this the Jack McFarland you have stated here who left the Empire and then did he go with another newspaper?

(Deposition of John E. Small.)

A. He didn't go with another newspaper. He established the Juneau Independent.

Q. Is he with that Juneau Independent now?

A. No, he isn't.

Q. And how long was he with them, do you know?

A. I don't recall exactly. He had been gone for a month or so, I suppose, when I first learned of it by reading an Independent up here.

Q. Do you know who he established that with?

A. Yes, Irvin Jensen and a printer whose name I can't recall right now.

Q. Was George Sundborg in that newspaper?

A. Not at that time, no.

Q. He is now?

A. He, as I understand it, now is the publisher and principal stockholder, but I don't know that for a fact. [125]

Q. Did I understand you correctly to state that Helen took no part in the publication?

A. I didn't say she took no part. I said—you are talking about this publication?

Q. Yes, prior to its publication.

A. I have no knowledge of her taking any part in it except in that Helen was present there and Helen generally tended pretty close to her business in matters of publication, especially where they referred to the so-called Gruening Machine.

Q. Well, was there anything strange in a newspaper taking sides politically?

A. I would say no, there is nothing strange

(Deposition of John E. Small.)

about a newspaper taking sides politically, but there are extremes beyond which ethical newspapers don't go.

Q. I see. I understood you to state that Helen never gave instructions in regard to this matter, but expressed distaste for the Gruening Machine, is that correct?

A. Helen has never given me any instructions to do anything, but her attitude was expressed on many occasions in conversations with me and in conversations I overheard that the Gruening Machine could do no right and that——

Q. Do you know the reason why she would have any animosity, if you want to call it such, or feelings toward the Gruening Machine? [126]

A. I have her reasons, reasons expressed by other people and reasons I arrived at myself.

Q. Was that by reason of her father having been the former Governor?

A. That is what it appeared to me and from what I had heard people express around town. The opinions they expressed was—the primary reason for her antagonism towards the Governor was that she considered he had ousted her father from the Governor's chair. In fairness to Helen I will have to say she vigorously denied that and said she opposed the Gruening Machine because she considered it unethical.

Q. The evening you speak of being in the news-room, what was your occasion for being there?

A. It was common practice of mine to return

(Deposition of John E. Small.)

to work at night and complete work on stories that I hadn't finished during the day.

Q. By the way, have you discussed this case with anyone prior to the taking of your deposition here? A. Yes, I have.

Q. And with whom?

A. I have discussed it with my wife and I have talked to the attorney here about the fact I was going to—you are including any period from the time of that publication on—I also discussed it with Governor Gruening and at [127] that time he asked me what my attitude was and I told him I thought it was an underhanded blow and that I would be willing to testify in a libel suit. That was after it had been filed.

Q. After what?

A. After the libel suit had been filed I had a conversation with Governor Gruening which I told him that.

Q. That was after he filed the libel suit?

A. Yes.

Q. Did he call upon you or did you call upon him?

A. Neither actually. We met during the course of my coverage of the Federal Building one day. In other words, I went into his office on a matter of business and we discussed this publication and the libel suit.

Q. Was that conversation reported by you to anyone in the Empire as to the fact that you would testify in his behalf?

(Deposition of John E. Small.)

A. Well, it probably was discussed with somebody, but if you are intimating or asking whether or not I discussed it with Jim Beard or Helen Munson the answer is no.

Q. Did Mr. McFarland quit the Empire or was he dismissed?

A. To my knowledge he quit. I overheard him tell Jim Beard and Helen Munson that he was through and he made that threat several times before on similar arguments but hadn't carried them out, this time he did, however. That [128] afternoon Jim Beard, who apparently didn't know I had been in the newsroom at that time, told me he fired McFarland.

Q. You made reference to a telephone conversation between Helen Munson and a voice on the telephone? A. Yes.

Q. And do you know positively whose voice that was?

A. If you mean did I recognize the voice, no, but Helen Munson identified the voice as being that of her attorney, Faulkner.

Q. And how did she identify that to you?

A. She didn't to me. She turned to Jim Beard after the conversation and told him that Faulkner thought it was a libelous publication.

Q. Faulkner thought it was a libelous publication, but that could have been by someone else.

A. You mean she was saying somebody else had told her? No, the indication was she had just talked



(Deposition of John E. Small.)

to Faulkner and Faulkner was informing her of this.

Q. Now, you have no interest in the outcome of this?

A. Well, I answered no to that before. If you mean pecuniary interest the answer is no.

Q. No, I didn't mean a monetary interest in any sense of the word. Have you an interest in the outcome of this litigation as to which way you would like to see it terminated? [129]

A. I will put it this way: I have an interest in seeing that justice is done and if this is a libelous publication then I think it should be made known. If it isn't, why, that is up to the court.

Q. Let me ask you this, Mr. Small: You have been a reporter here on the Anchorage Times since March 1, 1953? A. Yes.

Q. And would you say that that newspaper impartially reports the news politically in favor or against one of the other parties as we know them today? A. The Times?

Q. Yes.

A. I would say generally that it does, yes.

Q. Would you not say that it leans towards the Gruening Machine? A. Its stories?

Q. Yes.

A. Not in content, no, I wouldn't say they do.

Q. Would you say it leans in favor of the Republican party? A. No, I would not.

Q. And what was this discussion you claimed to have had with Ed Coffey?

(Deposition of John E. Small.)

A. This was a discussion in which Ed Coffey and Jim Beard were involved. I don't recall the exact date except it was not too long after I came to work for the Empire and [130] it was during the course of a party in which a large number of people were involved. We had left Helen Munson's house to go over to Mike's place across the channel for dinner. There was a woman in the cab and they stopped at one of the hotels to let her get something and while she was—during that interval Beard and Coffey were attempting to impress on me the importance of being on the right side and the political wars that were in existence at that time down there.

Q. That was merely a matter of shop talk of persuasion, wasn't it?

A. I certainly didn't consider it such. It affected me to the extent that while—since that time I have known of certain things that Ed Coffey has done that I approved of, but I have been so prejudiced against him from that conversation that I haven't been able to regard Ed in a purely impersonal light since then.

Q. What Ed Coffey are you talking about?

A. The Ed Coffey who is an insurance agent here in Anchorage and who, at that time at least, was a member of the—I don't know the title—this tourist—

Q. Alaska Visitors Association? A. Yes.

Q. It is the Ed Coffey that lives here in Anchorage then? A. Yes. [131]

Q. And former Senator from this division?

(Deposition of John E. Small.)

A. Yes.

Q. And it was that one conversation that prejudiced you against Mr. Coffey?      A. Yes, it did.

Q. Do you mean by that that you shouldn't have loyalty to the person by whom you are employed?

A. That you should not?

Q. Or that you should?

A. I don't mean that. I don't quite understand that question.

Q. That is what I am trying to find out. Just what do you mean? Did he mean that you should be loyal to the person who is employing you?

A. Do I mean what?

Q. You said Mr. Coffey said that you better go along——

A. Mr. Coffey was not in this. Incidentally, it was not a two-sided conversation between Mr. Coffey and myself. It included Jim Beard and there was no mention of loyalties as such. I was being advised that for my own welfare I should play along with the right people and I would get somewhere in Alaska. If I didn't I would be gone.

Q. I see. And this evening that you refer to in your testimony of a conversation at the apartment of Jim Beard, you know that you heard loud voices but you don't know [132] who they were?

A. I know one was Jim Beard. I didn't recognize the other.

Q. You don't know anyone else?      A. Yes.

Q. Were you angry at the Empire when you

(Deposition of John E. Small.)

were there? When I say the Empire I am speaking of the publisher of this newspaper.

A. If you are speaking of personal anger the answer is no. I have never been angry at Helen Munson. I am not angry at her today. I like Helen Munson as a person. In fact, it is unfortunate she is being used as a tool by people with interests that I don't think are parallel to hers and I only regret that Helen has become involved in this sort of thing. If you mean am I angry at the policies that were practiced by the Empire the answer is, yes, I was. I disagreed with them and——

Q. Were you opposed to the policies from the beginning? A. From the beginning, yes.

Q. But you continued on? A. I did.

Q. Until the time you left?

A. That is right.

Q. Now, did you leave of your own accord?

A. Yes, I did.

Q. And what was your reason for leaving? [133]

A. My primary reason was just what I have stated—that I disagreed with them. The final trigger was the fact I found employment elsewhere and my wife had been pregnant the preceding period I had been there, finally had given birth to our daughter and I no longer felt the financial strain that I had been under before.

Q. Let me ask you this, Mr. Small: Did you leave because you weren't given certain assignments or given a more responsible position?

A. No, I did not.

(Deposition of John E. Small.)

Q. You did not?

A. I did not. In reference to that I might say here that Jim Beard at one time promised me the position of managing editor with the definite indication that it would be mine provided I played ball.

(Reading suspended.)

The Court: Pardon me. We have gone a bit overtime thinking that possibly we could conclude this deposition. Is there much more of it?

Mr. Kay: There is still another ten or twelve pages.

Mr. Nesbett: Still eight, nine, ten pages.

The Court: I hesitate to impose on the jury so long. We are fifteen minutes now overtime. It would seem that we could continue that in the morning, so we will recess the case until 10:00 o'clock tomorrow morning. [134]

(Whereupon, the jury was duly admonished, and the trial was adjourned until 10:00 o'clock a.m., November 16, 1955, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:)

The Court: We will resume the trial at this time in the Empire Printing Company cases. You may resume then the reading of the deposition of John E. Small.

Mr. Nesbett: This was the deposition of John E. Small taken by the plaintiffs in Anchorage,

(Deposition of John E. Small.)

Small being the former employee of the Empire and presently employed by the Anchorage Times. The questions I was reading at adjournment yesterday were the questions put to Mr. Small by attorney John Manders of Anchorage, representing the defendant Empire Printing Corporation. They were not my questions.

Mr. Faulkner: What page?

Mr. Nesbett: We stopped at Page 30 at Line 16.

Mr. Faulkner: Thank you.

The Court: That is on cross-examination, in other words.

Mr. Nesbett: This is on cross-examination. Mr. Faulkner can be considered as having asked these questions. Mr. Kay is representing Mr. Small in making these responses, in reading the answers.

(Reading resumed.) [135]

Q. Now, I don't know if it's so important, but you made some allusion or reference to the fact that Jim Beard might be sitting in the Governor's chair. That was, as I remember, after this publication.

A. Considerably after, I don't know the exact date, but I can date it by saying it was at the time of that ALCOA boom.

Q. At the time of the ALCOA entrance into Alaska if he had gone into the area there—around Haines or Skagway? A. Yes.

Q. Well, I guess Beard's ambitions were no different than another hundred thousand in the Territory were they to be Governor?

(Deposition of John E. Small.)

A. No, I wouldn't say they were different in that respect.

Q. As a matter of fact, I imagine you heard it from a lot of people that were going to be Governor?

A. No, I didn't. That is the only man I ever heard make the statement that he might be Governor some day.

Q. The only man that made a statement as such?

A. Yes.

Q. Did you hear of other people who thought they would be Governor?

A. Yes, I have heard they had that ambition.

Q. Plenty of them. Now the only persons I understood you discussed this matter with were Mrs. Small, your wife, [136] Mr. Nesbett and Governor Gruening?

A. Well, no—did you say discussed my testifying?

Q. Yes, this case?

A. Oh, I think that there are probably others—Jack McFarland, I don't recall definitely discussing it with him, but he was a friend of mine and undoubtedly I did at some time or another tell him I was going to testify if it ever came to trial. And, incidentally, Irvin Jensen, who is another member of the Independent who quit at the same time McFarland did for the same reason, I probably discussed it with him.

Q. Now, let me ask you this: Have you any

(Deposition of John E. Small.)

intentions of leaving your present residence here in Anchorage when this case comes to trial?

A. Right now?

Q. As it stands at the present day?

A. Right now my plans for the future are a little indefinite. My wife and I had been hoping to get a year's leave of absence and attend the University of Mexico, however, correspondence that we received just recently indicates that those plans won't develop and if they don't then we have no plans for leaving.

Q. In other words, it is your intention to be right here in the Territory?      A. Yes.

Q. Did I understand you to say the University of Mexico? [137]      A. Yes.

Q. Not New Mexico?      A. No. Mexico.

Q. By the way how old are you, Mr. Small?

A. 39.

Q. Let me ask you this question: Isn't it generally the run of the mill in newspaper offices for reporters, editors and others to get together?

A. Yes, it is.

Q. And comment over the fact that they have gotten a scoop, what they are trying to do, either going to solve a murder or they are going to do this, that and the other thing—I mean, there is usually a feeling of working on a problem, isn't there?

A. No, not necessarily. When you get a scoop you will probably discuss it over coffee conversations or bare conversations with your other members of the editorial staff.



(Deposition of John E. Small.)

Q. Now, just what conversation did you have with Helen Munson? A. I beg your pardon?

Q. Just what conversation did you have with Helen Munson just shortly before or after this publication that has been referred to as the publication of September 25, 1952?

A. Well, I don't know what you are [138] getting at.

Q. What were your conversation with her?

A. I have had many, many conversations with Helen.

Q. I don't mean about automobile accidents down the street, but in relation to this publication?

A. None prior to the publication. After the publication I told Helen that Jim Beard had gotten her into a lot of trouble; that that was a libelous publication and it was at that time, I believe, or just a few minutes after then that Jim Beard said they could get around that by writing a retraction in the following day's publication, which they did, stating that it was not the intention of the previous day's publication to imply graft or corruption. I told Helen that I thought that wouldn't do much good. Helen was very much upset at that time and Helen was angry with me.

Q. She was angry with you?

A. Yes, she was. Apparently she thought—I will say that in any other matters besides Governor Gruening Helen Munson was one of the nicest persons I have known. When I attempted and I had attempted during my time at the Empire, to discuss that with her you just couldn't talk to her about

(Deposition of John E. Small.)

that one subject. When you attempted to do so it just led to anger on her part, as it did this time.

Q. Did she ever go into any details with you, or generally, why her feelings towards Governor Gruening was such as [139] it was?

A. Oh, yes. She has told me on various occasions about the Gruening Machine; the graft and corruption which she said was perpetrated by that machine, by Governor Gruening. She also brought up the fact that she is aware of this feeling that her antipathy arises from the feeling that Gruening caused her father to be ousted from the Governor's chair and she has brought that up and said that it isn't so.

Q. And the Helen you are referring to in every instance here is Helen Munson? A. Yes.

Q. And there is no question that there was rivalry at all times between the Empire and Gruening?

A. No question whatsoever. That was the first thing I learned the day I got there.

Q. Since the time you came to Alaska—you testified you knew nothing of the political situation or Alaskan politics? A. No, I didn't.

Q. Since that time have you found out what they are? A. Yes, I think I have.

Q. And is the same situation existing today as was existent during the time you were, as to politics now, with the Empire? [140]

A. Well, I don't know exactly what you mean by

(Deposition of John E. Small.)

that. Governor Gruening was subsequently defeated. Metcalf was——

Q. Well, excepting when you say “defeated” you mean not reappointed?      A. Yes.

Q. Do you find today there is a Gruening Machine and an Anti-Gruening Machine?

A. I never found there was a Gruening Machine. During my time there I found there was a Governor Gruening who was administrator of the Territory and that he had people working for him and people who were in favor of him and his policies. I never found any evidence that he had a machine, political machine as I have been given to understand such exists and to my knowledge none exists today. There is a Democratic faction and a Republican faction.

There are a couple of them, I guess, in the Territory.

Q. At least there are enough factions?

A. Yes, that is true.

Mr. Manders: That is all.

(Reading suspended.)

Mr. Nesbett: Questioning now——

(Reading resumed.)

Q. (By Mr. Nesbett): Mr. Small, when you said, in response to one of Mr. [141] Manders' questions, that you opposed the policies of the Empire but continued to work there for some time

(Deposition of John E. Small.)

what did you mean by the words "opposed policies"?

A. I meant that I considered not the Empire's antagonism towards Gruening as being wrong, but the editorial practices they used in attempts to unset Gruening as being very unethical.

Q. Do you mean, in other words, the editorial comments and news reporting was distorted in an unethical manner in order to reflect upon Gruening and his administrative officials?

A. Yes, editorials were distorted, facts, stories distorted and deliberately so to my knowledge.

Q. Now, when you stated, also in response to one of Mr. Manders' questions, that Jim Beard had once told you that he would make you managing editor if you played ball did you understand him to mean by "play ball" that you should continue to carry out that editorial policy of the Empire?      A. Yes.

Mr. Manders: Just one minute. I didn't make the statement about Jim Beard asking you to play ball. I think that was your answer in response to a question I asked you.      A. Yes.

Mr. Nesbett: That was just the way I quoted it I [142] think.

(Thereupon, the reporter read question line 17, page 36.)

Mr. Nesbett: I believe that is all.

Mr. Manders: Just a couple of questions.

(Reading suspended.)

(Deposition of John E. Small.)

Mr. Nesbett: Now, these are questions by Mr. Manders on behalf of the defendant.

(Reading resumed.)

Q. (By Mr. Manders): What is your feeling toward the Empire? I am speaking of the newspaper now.

A. Toward the newspaper? It is my feeling it is a poor newspaper as a journalistic enterprise.

Q. And as to the people who operate it?

A. The people who operate it? I only know two people who operate it now personally, Helen Munson and I think Helen Munson, as I have said, is a very fine person with a fixation that is unfortunate, as I have stated before. I know the man who has the title, at least, of managing editor down there, Bob Kedrick, who is, in my opinion, not doing the job of newspapering that I expected him to do down there. I have heard reports by the grapevine that that isn't at all his fault that he is not allowed to run the newspaper. He is a former employee of the [143] News.

Q. My recollection is that you said that you quit of your own accord—the Empire? A. Yes.

Q. And was your reason for quitting there the fact that you had been disappointed in your work with them?

A. No, the reason I quit was that, as I stated, the primary reason was that I disagreed with Empire policies, I learned that those policies were not going to be abated or were not going to cease; that

(Deposition of John E. Small.)

Jim Beard appeared at that time to be taking even a stronger hold than he had had before on the operation of the plant and I had asked Robert Atwood, publisher of the Times, for employment here and he told me, yes, I could come up here and go to work. So my only reason for staying with the Empire as long as I did was the fear of finding myself without funds or employment up here while I had a pregnant wife. Those fears had been dissipated and I had no further reason for staying there.

Q. Then your reason for whatever feeling you have against the Empire, whether it is one of animosity, would be by reason of the fact that you didn't like their policies, is that it?

A. I object to the use of "animosity." I object to the Empire today on the same ground I did before, on the [144] ground that they operate an unethical newspaper.

Q. That the paper itself is an unethical newspaper?

A. The unethical operation. The journalistic practices don't conform to my ideals of good impartial journalistic reporting.

Q. The real basis then is a difference in opinion as to what you believe and what the policy is?

A. That is right. They apparently believe it is all right to distort news. I believe that it isn't.

Q. And were there any differences by reason of the personnel there?

A. Only indirectly in that at one time shortly

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before I quit I had been given the impression that Jim Beard was on the way out and I had reason to believe then that Jack Daum, who was a good newspaper man, was taking over and I had no objection to working under him. I thought possibly the practices that had been in effect there would cease and shortly before I quit I was informed that this was not going to be so and at that time Robert Atwood happened to be in town so I asked him for a job and was given a job.

Q. The editor of the Anchorage Times was in Juneau at that time?

A. He stopped in Juneau on his way somewhere from the states.

Q. You asked him? [145]

A. Yes, I met him at the hotel and asked him.

Q. To place you on his paper and he agreed to it?      A. Yes.

Q. And at that time he knew you were still with the Empire?

A. I was still with the Empire, yes.

Mr. Manders: I think that is all.

Mr. Nesbett: That is all.

(Reading suspended.)

Mr. Nesbett: And in the back of the deposition, ladies and gentlemen, is a correction which Mr. Small later requested to have inserted and made a part of the deposition, so he went to the reporter's office, the reporter who took this in shorthand and transcribed it, and dictated the following: "Anchorage,

Alaska, April 25, 1955. To Whom It May Concern:

“I desire to correct testimony given in my deposition on April 15, 1955, regarding causes Henry Roden, Plaintiff, vs. Empire Printing Company, Defendant; Ernest Gruening, Plaintiff, vs. Empire Printing Company, Defendant; and Frank A. Metcalf, Plaintiff, vs. Empire Printing Company, Defendant; Nos. 6725-A, 6726-A and 6727-A, respectively, to be changed as follows:

“Page 39 of the deposition, regarding how and when I was hired by Robert Atwood, in my testimony I answered the [146] question as to whether or not he hired me there and then and I answered, “Yes,” which is not the truth. He told me he would have to discuss it with his managing editor and probably a week or two after that I called him up by long distance telephone and asked him again and at that time he told me to come on up.” Signed, “John Small.”

(Reading concluded.)

Your Honor, at this time I should like to publish the deposition of Neil Moore taken at my request in Juneau in Mr. Faulkner’s office, the original of which is in the Court’s file.

The Court: Very well. You wish that to be read in the same manner as the other deposition?

Mr. Nesbett: If your Honor please, yes.

The Court: That is the proper procedure and may be done.

Mr. Nesbett: Deposition of Neil F. Moore taken



on October 10, 1955, at Juneau, Alaska. Appearances: Buell A. Nesbett, Attorney for Plaintiffs; H. L. Faulkner, of Attorneys for Defendant. "Neil F. Moore being first duly sworn upon oath deposes as follows: By Mr. Nesbett:"

(Whereupon, the deposition of Neil F. Moore was read as follows—questions by Mr. Nesbett and answers by Mr. Kay:)

(Reading.)

#### DEPOSITION OF NEIL MOORE

Q. Your name is Neil Moore, is it not?

A. Neil F. Moore. [147]

Q. And up until very recently you were Auditor of the Territory of Alaska, were you not?

A. That is right.

Q. And you were Auditor on September 25, 1952, were you not, Mr. Moore?      A. Yes.

Q. And for some time prior to that date?

A. Since December 15, I think, of 1950.

Q. Now, Mr. Moore, you are familiar in general with the front page of the Daily Alaska Empire which was printed on September 25, 1952—the basis of these suits—are you not?

A. I remember that.

Q. Concerning the ferry fund and so forth?

A. Yes.

Q. Mr. Moore, did you know that the special ferry fund, so-called, existed prior to September 25, 1952?

A. I don't remember the exact dates. It was

(Deposition of Neil F. Moore.)

called to my attention by one of the crew members and we got in touch at that time with the Attorney General's office, but I don't remember what date it was.

Q. Was that crew member one Steve Homer?

A. I guess that is his name. Steve Homer Larsson.

Mr. Faulkner: Steve Larsson Homer.

Q. As Auditor, Mr. Moore, you knew that the Territory had [148] purchased the Chilkoot Ferry, did you not?

A. Oh, I was well aware of that; yes.

In fact, you authorized the payment of the purchase price, did you not?

A. When they bought the ferry, yes; the boat itself.

Q. And that was something over a year prior to September 25, 1952, wasn't it?

A. I don't remember just what the dates are.

Q. It was a considerable time prior to September 25 of 1952?

A. It could have been a year, all right.

Q. And you knew also that the Territory, through the three members of this Board, was operating the ferry, did you not?

A. Yes. It is part of the road extension, as it was claimed.

Q. Yes. As a matter of fact, the voucher payments for the salaries and expenses of the operation of the ferry passed through your office and were subject to your approval, were they not?

(Deposition of Neil F. Moore.)

A. They were supposed to.

Q. Well, as a matter of fact, they did, did they not?

A. Well, the way I remember it, not all of them did.

Q. Now, I will ask you whether or not the vouchers that did pass through your office and approved by you and paid, were not vouchers for payment of the expenses out of the Motor Fuel Tax Fund? [149]

A. That was where they were supposed to have been paid from.

Q. Now, you were well aware that vouchers for the expense of operating this ferry which were being paid out of the Motor Fuel Tax Fund did not pass through your office for a number of months prior to September 25 of 1952, were you not?

A. I was aware of it?

Q. Yes.

A. I don't recall. I think maybe it came to my mind now and then, but the reasons for holding them up, paying them some other way, were not brought to my attention. I didn't know what was going on.

Q. Well, as Auditor, when the vouchers for the payment of the expenses of the ferry failed to come through your office, didn't you inquire as to how the expenses were being met? A. No.

Q. You made no effort whatsoever to learn that fact?

A. It wasn't my business to. We had expenses of

(Deposition of Neil F. Moore.)

the Territory come in maybe five or six years after the expenditure was entered into.

Q. Ordinarily during the time the Territory owned and operated the Chilkoot Ferry, the vouchers had passed through your office regularly every month, had they not, to pay the crew and so [150] on?

A. As I recall, I think some of them did, that is right, and if they did, I wouldn't have been too particularly concerned about other bills because I wouldn't know if they had any on tap or not.

Q. Didn't you, after such vouchers discontinued to come through your office, make any investigation as to why they were not coming through?

A. I don't think they were discontinued. The regular salary vouchers, as I remember, came through every month, if I remember rightly. This particular check that was brought to me was not a salary check in the regular sense of the word. It was an overtime payment check. I think that was what it was, and there were two things wrong with it: One was that it did not go through the Auditor's office, and the other was that the Territory did not recognize overtime payments. They still don't—overtime, that is.

Q. Was that check presented to you for payment?

A. No, it was just given to me and I was asked what about it, and I asked where he got it and he

(Deposition of Neil F. Moore.)

just said it was for overtime. I said where did he get it and he said that was the way he was paid, and I said you can't be paid that way, so he asked me what to do with it and I said to leave it with me, he did, and I took it to the Attorney General's office, and what happened to it after that I don't recall. That is what started it, anyway. [151]

Q. Is it your testimony that that was the first knowledge you had of the existence of this fund?

A. That was the first knowledge I had that money was being paid from this fund.

Q. Was that the first knowledge you had that this fund existed?

A. As I recall, the money collected by the various agents of the Chilkoot was put into the bank account, which was perfectly all right, according to the Attorney General, but when they started paying expenses out of it, that is where the wrong arose. You see, even right today the Department of Taxation, for example, will deposit money into a bank in their own name and then at the end of the month they will get a cashier's check and transmit the money to the Treasurer or to their head office.

Q. Well, then, how long prior to Mr. Homer's visit to your office were you aware that this fund existed?

A. That I do not know. I did finally find out about it, but there was nothing we could do about it so long as money was not spent; assuming they are Territorial expenses, that is. As soon as we

(Deposition of Neil F. Moore.)

found that out, we took it immediately to the Attorney General. I didn't fiddle around with it.

Q. As a matter of fact, you knew the fund existed for many months prior to September 25 of '52, didn't you? [152]

A. Well, I could have, so long as money was just put there and turned over to the Treasurer, but I don't remember if they actually turned any money over to the Treasurer or not. But so long as they didn't spend it, it was supposedly Territorial money and would be eventually turned over to the Treasurer.

Q. Did you know how the expenses and wages in connection with the operation of the ferry were being paid?

A. As you pointed out to me, I was paying some of the expenses, the regular salary expenses and I don't recall what other expenses were paid, but as long as some were being paid, I was in no position to know if all of them were being paid or not.

Q. At a time long prior to September 25 of '52 all such vouchers ceased to come through your office, did they not?      A. I don't remember.

Q. You don't remember?

A. I don't remember.

Q. Did you know that a special meeting had been held by Gruening, Metcalf and Roden, with the Attorney General, in connection with establishing this fund?

A. That I do not know either, but I will say this, that if there was such a meeting held, I don't

(Deposition of Neil F. Moore.)

think any authorization was given to that Board to spend money out of it, because it was his opinion to me that it could not be [153] done.

Mr. Faulkner: Whose opinion?

A. The Attorney General's. He was the one who helped me when I brought it to their attention.

Q. You don't know that at that meeting that I referred to the Attorney General was present and approved the establishment of the fund?

A. No; it was never called to my attention.

Q. Now, why did Mr. Steve Homer bring this check which is reproduced on the front page of the Alaska Empire on September 25 to your office, do you know?

A. I don't know. I don't know why he brought it to me, but he did. I didn't take the check. I asked him if he would leave it and he said yes, and that is how I got my hands on it.

Q. Did you give him any money for the check?

A. No.

Q. You just asked him to leave it there, is that correct? A. Yes.

Q. What did you do then?

A. I took it up to the Attorney General's office.

Q. Did you call Governor Gruening or Henry Roden or Frank Metcalf about it? A. No.

Q. Why didn't you? [154]

A. Because I didn't think they should be concerned with it. I took it to the Attorney General and then if he wanted to talk to them, fine and dandy. I don't know, maybe he did.

(Deposition of Neil F. Moore.)

Q. Ordinarily in a case like that, if you thought disbursements were not being properly made, wouldn't you take it up with the officials concerned first?

A. In that case, no, because it was not a payment according to law and it should have gone right directly to the legal officer, the Attorney General, and that is where it went.

Q. How did you know from looking at the check that it was a payment not according to law?

A. It wasn't a Territorial warrant, to begin with, and it was signed by—I don't know what his title was—skipper of the Chilkoot Ferry, Mr. Steve Larsson Homer.

Mr. Faulkner: It was signed by Bob Coughlin.

A. That is right, the purser, but Mr. Homer brought it to me and he said this is for overtime pay on the ferry. Well, the ferry wasn't chartered out or under contract to anyone—the Territory was actually running the ferry.

Q. Why did Mr. Homer bring the check to you?

A. I don't know. I don't know why he brought it to me. He could have just as well taken it to the Attorney General himself. [155]

Q. Did you call the Behrends Bank and ask them what the Chilkoot Ferry Fund was all about?

A. I don't know whether I called them right then or waited until the Attorney General and I talked it over, but we did go down, that is, the Attorney General and I.



(Deposition of Neil F. Moore.)

Q. And you never at any time called any of the three members of the Board, the plaintiffs in these cases? A. I never did no.

Q. As a matter of fact, you were not on speaking terms with most of them, were you?

A. I had to be. We were on the same boards.

Q. Well, ordinarily, wouldn't you have contacted them and said, "What's cooking here"?

A. No. I didn't do it in the other case.

Q. Which other case?

A. The Treasurer's defalcation. I went directly to the Attorney General.

Q. Well, now, didn't you also go to the Daily Alaska Empire on that day or the following day?

A. Not that I recall.

Q. Well, you did go there in connection with this matter, didn't you?

A. I think they came to me, if I recall correctly.

Q. Don't you recall going to their office with this check? A. To their office? [156]

Q. Yes.

A. No, I didn't take the check down there.

Q. Did you call them about the check to visit you in your office?

A. I don't think I even had the check when they came to talk to me about the story. I think I turned it directly over to the Attorney General. I don't recall, though.

Q. Then you could have not remembered at this date is that your testimony?

(Deposition of Neil F. Moore.)

A. No; I think I took it right straight up to the Attorney General's office.

Q. And with whom did you talk there?

A. John Dimond, the Assistant Attorney General.

Q. Was Mr. Williams in?

A. He wasn't even in town, if I remember rightly.

Q. And did you cause this Chilkoot Ferry Fund in the Behrends Bank to be frozen?

A. The Assistant Attorney General, John Dimond, and I both did; we both went down together.

Q. Did John Dimond actually take part in discussion with the bank and tell them to freeze the fund, that it was illegal?

A. We were both there and we just pointed out to them that these were Territorial expenses being paid in an illegal manner, and that was it. I don't know whether we told [157] them to freeze it or not, but they automatically would.

Q. Now, if I told you that John Dimond denies having anything to do with freezing the fund, would you still testify as you just have?

A. I don't recall whether we told the bank to freeze it or not. We just told them it was illegal to make payments from it.

Q. You told them that, didn't you?

A. We both did, I think.

Q. Well, you knew that if the fund was frozen that there would be no money to pay the employees or expenses of the ferry?

(Deposition of Neil F. Moore.)

A. It would come out of the Gas Tax money. That is where all of it should have been paid from.

Q. Didn't you call any of the members of that Board and say "there is an incorrect procedure here and let's get it straightened out"?

A. No.

Q. Why didn't you?

A. I took it to the Attorney General.

Q. In the interests of harmony and permitting the Territory to smoothly operate the ferry, you should have gone to one of the three to straighten it out peacefully, shouldn't you?

A. The matter, as I recall, was thrashed out before and the [158] device used was the same device used by the former Treasurer. There was a special account and illegal payments from it, and they were just as well aware of it as I was.

Q. This Chilkoot Ferry Fund check was signed by Coughlin, wasn't it?      A. Yes.

Q. And the members of the Highway Board or the operators of the ferry had nothing to do with the checking account, that is, to check on it, did they?

A. I don't imagine that Bobby Coughlin would have ever signed the checks without authority. He must have had some authority some place.

Q. I am not questioning Coughlin's authority. I am saying that he was the one in whose trust the account was made; isn't that correct?

A. As I understand, he deposited the money in it and he also drew the checks on it, but in both cases I don't see him doing that without any au-

(Deposition of Neil F. Moore.)

thority from some source, some place. He could have just as well deposited it in the Territorial Treasury and submitted the vouchers for the payment of his crew and his expenses in regular order.

Q. From the Motor Fuel Tax Fund?

A. From the Motor Fuel Tax Fund, yes, just like some of them were. [159]

Q. Isn't it a fact, Mr. Moore, that you were bitterly opposed to Gruening and most of the officials serving under him at that time?

A. You mean personally or in a business way?

Q. Both.

A. Well. I imagine there were one or two that I wasn't compatible with, but we all had our differences in the way we did things, but I didn't have any animosity towards Henry Roden, and I don't think I had any at the time toward Frank Metcalf. I did with Gruening because of the way that things had happened before. I didn't have any love for Gruening and he had none for me.

Q. As a matter of fact, you were very unfriendly toward Metcalf practically from the time you both took office, weren't you?

A. I don't know where you got that information, but that isn't true.

Q. Didn't your animosity toward Frank Metcalf commence on or about the day you called him and asked him to come down to visit you in your office and he said to come up to his office if you wanted to visit; do you recall that?

(Deposition of Neil F. Moore.)

A. No, I don't recall that. Do you know of any of the conversation that took place?

Q. I am asking you if you do.

A. Well, if you could tell me a little bit—— [160]

Q. Well, I told you of the incident. Do you recall it?

A. When I called him to come up and see me?

Q. Yes.

A. And he said come down and see him——

Q. Or words to that effect.

A. No, I don't remember that. The only time I was ever called down to his office—no, if I did, I don't recall when it was.

Q. Didn't that feeling you have for Metcalf deepen after the incident in August of 1951 when you disapproved a \$5.00 expense item that he had incurred in connection with Governor Dewey's visit here?

A. No, I don't think so. I don't remember, but I don't think so.

Q. You recall that incident?

A. Yes, I remember it.

Q. When you told him that Democrats had no business paying expenses of Republicans?

A. That's right, or words to that effect—particularly when it was not Territorial business.

Mr. Nesbett: I think that is all.

By Mr. Faulkner:

(Reading suspended.)

Mr. Nesbett: These questions then were pro-

(Deposition of Neil F. Moore.)

pounded by Mr. Faulkner on cross-examination of Mr. Neil Moore, the [161] Auditor.

(Reading resumed.)

Q. Neil, when you went to the Behrends Bank to tell them that this ferry fund set up there was illegal or was wrong, you say Mr. Dimond went with you, the Assistant Attorney General?

A. Yes. It was a highly technical thing, and I wanted him with me down there. In fact, I asked him to go with me.

Q. Did Mr. Dimond say that you were wrong about it or did he make any objection to what you were doing at the bank when you went down there?

A. No, no; if I recall rightly, I asked him if it was right or wrong and he said it was wrong. But I think we both had two different things in mind. I had the deposit of the money in mind there, and he may have had the thought in mind that the withdrawal of the money to pay Territorial expenses was wrong.

Q. Now, under the law you had an interest in this matter as Auditor?

A. For instance, as soon as any of the money was being spent for Territorial expenses, yes. As far as the deposit was concerned, no; that was the Treasurer's.

Q. That proportion was supposed to be turned over to the Treasurer as the law requires?

A. Yes. [162]

(Deposition of Neil F. Moore.)

Q. As Auditor you, by law, were required to scrutinize all payments of all vouchers?

A. Yes.

Q. That was your interest in this matter?

A. That's right.

Q. When this special bank account was closed, do you remember how much was in it?

A. No, I don't. It seems to me it was two or three thousand dollars, but I don't recall.

Q. You don't recall. You don't recall whether it was two, three or ten thousand?

A. It seems to me it wasn't above the ten thousand mark, but I don't remember.

Q. All right, if you don't remember, that is all right.

Now, let's go back to this check of Steve Homer's. Is it a fact that Steve brought this check to you after that bank account had been closed and that the reason he brought it to you was that he could not cash it?

A. No, he brought it to me—I don't know why he brought it to me, as a matter of fact, but the Assistant Attorney General and I went down there and the account, as I recall it, was still active.

Q. Didn't Steve Homer bring the check to you afterward because he couldn't get it cashed? If you remember—if you don't remember, why just say so. [163]

A. Now that you mention those things, it seems like there was something there, why he brought it to me.

(Deposition of Neil F. Moore.)

Q. Yes, otherwise he would just take it up there and cash it. Isn't it a fact that he took it there and couldn't cash it, and brought it to you to see what was the matter? A. I don't remember.

Q. He would remember that. A. Yes.

Q. Now, Neil, when this article appeared in the *Empire*, or before it appeared, did the reporter come to you for this story? He quotes you in the paper as telling about the account.

A. The story came out after I had written to the Attorney General about it.

Q. And your letters to the Attorney General were published in the same issue? A. Yes.

Q. In that same issue there was an interview with Roden and Metcalf, the plaintiffs, about the setting up of this fund and the payments out of the fund. Do you recall that?

A. Was it in the *Empire*?

Q. Yes. A. No, I don't recall that. [164]

Q. Do you recall any remark that Frank Metcalf made that it was a bookkeeping trick to avoid going through the regular procedure of the Auditor's office?

A. That was told me to. That was what was told to me; yes.

Q. To avoid going through the Auditor's office?

A. Yes.

Q. Now, Neil do you know—the law requires, does it not, that the accounts of the Territory be audited by a firm of public accountants once each year?



(Deposition of Neil F. Moore.)

A. At that time it was at least once each biennium.

Q. Biennium?           A. I think it was.

Q. Now, at the end of the biennium concerned, was there a firm of auditors employed to audit the Territory's accounts?

A. Yes; Arthur Anderson and Company.

Q. Arthur Anderson and Company; of Seattle?

A. Yes.

Q. They made and filed a report including a report of this fund?           A. Yes.

Q. And did they find there a shortage in the fund?           A. Yes.

Q. Something over three hundred dollars?

A. I think it was three hundred dollars even. [165]

Q. Three hundred and a few cents.           A. Oh.

Mr. Faulkner: If it is agreeable with you, Mr. Nesbett, I would like a recess now until eight o'clock. There are only a few more questions I would like to ask at that time.

Mr. Nesbett: All right.

(Mr. Moore being previously sworn, continued his testimony at 8:00 o'clock p.m.)

(Reading suspended.)

Mr. Nesbett: Resuming questioning by Mr. Faulkner on cross-examination of Neil Moore.

(Reading resumed.)

(Deposition of Neil F. Moore.)

Q. (By Mr. Faulkner): Neil, this copy of the Empire of September 25—have you looked over that since we adjourned at five o'clock?

A. Yes.

Q. September 25, 1952. Now, in the articles regarding the ferry, where they give the facts here about the setting up of the account, did you give those facts to Jack Daum, who wrote the article?

A. I don't remember if it was Jack Daum or not, but if it were, yes, I did. He came in and asked various questions and he was answered.

Q. And he was the reporter for the [166] Empire? A. Yes.

Q. And this copy of the letter that you wrote to the Attorney General, did you give him that too, that was published in the paper?

A. He asked for it and he was given a copy of it, or he copied it, I don't know which.

Q. Now, in connection with the ferry and the payments from the so-called ferry account, were there some payments made to aliens on that boat?

A. Well, that is what I learned, and that was one of the things that was wrong, that you have to be a citizen to work for the Territory.

Q. Yes.

A. And any payments to an alien, well, that was entirely wrong, illegal payment.

Q. Illegal payment. Now, with reference to the Oscar Olson account, you refer in this letter to the Attorney General to the Oscar Olson case. In what

(Deposition of Neil F. Moore.)

respect was that similar—you say it was similar—did Olson set up a separate account?

A. It was a parallel case in that in both cases there was a separate account set up and money withdrawn from that account.

Q. Yes; and now we refer to the Anderson report, which you talked about here before five o'clock, where they audited [167] the Territorial accounts and in the portion of the report on the ferry account, you say they showed a shortage of three hundred dollars and some cents?

A. Yes, that's right.

Q. What period did that report cover?

A. Well, the audit by Arthur Anderson and Company was for the biennium ending December 31, 1952.

Q. That would be the years 1951 and '52?

A. That's right.

Q. Up to the end of December of 1952?

A. That's right.

Mr. Faulkner: I think that's all.

(Reading suspended.)

Mr. Nesbett: Questions——

(Reading resumed.)

Q. (By Mr. Nesbett): What facts do you refer to, Mr. Moore, when you say you gave the facts to Mr. Daum?

A. The facts regarding the handling of the Chilkoot Ferry money, the Territorial money.

(Deposition of Neil F. Moore.)

Q. Which article would that be reported in, the feature article on the right-hand side?

A. Yes.

Q. —entitled “Gruening, Metcalf, Roden Divert ‘Chilkoot’ Cash to Private Bank Account”?

A. Yes. That deal—when they came up to me they asked me what I had found out and what we had done, and those are the facts we gave them, that is, I gave them.

Q. Did you give them these facts, namely the leader here entitled “Gruening, Metcalf, Roden Divert ‘Chilkoot’ Cash to Private Bank Account”?

A. No, I didn’t give them those exact words. The wording that I used is more or less in the letter that is published there too.

Q. Did you give them the wording farther on down in that article in the second sentence of the subheading, entitled “Illegal Payments,” the sentence which says, referring to the fund, “Into it have gone the receipts from the operation of the ferry, which was purchased by the Territory in May, 1951, and there have been thousands of dollars of illegal receipts and disbursements recorded in the fund to date, Moore charged.”

A. I don’t think I said “illegal receipts,” but it was illegal payments.

Q. The receipts were not illegal, in your opinion, were they?

A. No, the receipts they deposited according to the Attorney General, but according to the Attorney General’s opinion, the receipts could not be

(Deposition of Neil F. Moore.)

deposited in the bank but in the General Fund only, so if I did say that, I had in mind the Attorney General's opinion, which I pointed out [169] in the letter, too.

Q. But it isn't your opinion and you didn't say, as far as you recall—— A. To the reporter?

Q. That there have been thousands of dollars of illegal receipts?

A. No, it couldn't be termed that way, because the receipts were perfectly legal. It was the deposit of the money that was illegal.

Q. Well, then, you didn't tell them how to write this feature article on the right-hand side of the page, did you? You gave them certain facts——

Mr. Faulkner: I object to that. That isn't what I asked him. I asked him if he gave them the facts. I don't claim that he wrote the article or used the language that is in the article.

Mr. Nesbett: I know that, Bert, but I am just bringing it out.

Mr. Faulkner: Yes.

(Reading suspended.)

Mr. Nesbett: Questioning resumed by Mr. Nesbett.

(Reading resumed.)

Q. You didn't have anything to do with the drafting or the setup of this article at all, did you, Mr. Moore?

A. No, I didn't have anything to do with the

(Deposition of Neil F. Moore.)

writing of the [170] story; no. I just gave them the information that they asked for and that was it.

Q. And no proof of the story was given to you for checking before they published the same, was it?

A. No, I don't recall that. They may have called me up occasionally and verified certain facts, to see if they had them correct or not.

Q. They called you quite often, didn't they?

A. Yes, in fact up until I resigned here a couple of weeks ago they were up every day to the office. They visit all the offices, all the reporters.

Q. Now is it your testimony now that monies were paid out of this fund to aliens?

A. Some of the money was; yes.

Q. Do you know who those aliens were?

A. Their names? No, I don't.

Mr. Faulkner: I think we can furnish that. I have another witness who will be at the trial.

Q. Was Steve Homer an alien?

A. No. Do you mean foreign-born, not a naturalized citizen?

Q. Well, you used the word "alien." Under your definition, would he be an alien? A. No.

Q. At the time Steve Homer brought that check into you, you knew of no other payments out of that fund to other [171] people, did you?

A. Not until that check was brought to my attention.

Q. Well, as a matter of fact, you didn't know any payments had been made out of that fund to

(Deposition of Neil F. Moore.)

aliens at the time you rushed up to the Attorney General's office, did you?

A. At that time—I don't know whether it was before or after. I don't recall now.

Q. Well, Steve Homer's check was the first check brought to your attention drawn on this Chilkoot Ferry Fund, wasn't it?

A. That's what I recall; yes.

Q. Well, if any previous checks had been drawn to your attention, you would remember them, wouldn't you?

A. Yes, I would have done the same thing as I did now.

Q. All right. Then Steve Homer's check, we can assume, is the first check that came to your attention, is that right?

A. We assume it; yes.

Q. And up to that time naturally you didn't know any funds had been paid out to aliens, would you?

A. No, it wasn't until afterwards that I heard about it.

Q. That wasn't your reason then for going to the Attorney General in the first place, was it?

A. No; in the first place——

Q. Now, with respect to Oscar Olson, what type account did [172] he have that was, as you term, a separate account?

A. It was money established in a separate account in the bank which was not authorized by any law.

(Deposition of Neil F. Moore.)

Q. Which bank? A. Behrends Bank.

Q. What was the name of the account?

A. I don't know if it was in his name or the Treasurer's name, but money was diverted into that account and he drew checks on it, personal checks on it.

Q. Well, actually, as a matter of fact, it was in the Treasurer's name, wasn't it?

A. I don't remember how he had it set up in the bank.

Q. Well, if you can't remember what type account he had, how can you say it was a parallel case?

A. Well, when the Auditors found it, it showed it.

Q. Showed what?

A. Showed that he had a special account in the bank.

Q. What was the special account?

A. It was a device that he was using.

Q. What was the name of the account? How did he use it?

A. He used it for any purpose he saw fit.

Q. Well, what title did he give these checks to allow the bank to determine which one to charge?

A. I think some were just charged—written—Oscar G. Olson, if I remember rightly. As a matter of fact, some were [173] not signed by him but by his help, "Oscar G. Olson by so and so."

Q. Then the account had no particular title, is that right? A. I don't know.



(Deposition of Neil F. Moore.)

Q. Well, now, where do you get this wording, "parallel case"? What are you trying to do, justify in your testimony the statement in the Empire that the case closely parallels that of Oscar Olson and so on?

A. No. I wrote that in my letter to the Attorney General so that he would know exactly what we had discovered, that it was another device similar to the one that the former Treasurer had used, that they had a fund which no one could touch except the Treasurer, no one could draw a check on it except the Treasurer. The same way with the other one. The Chilkoot Ferry Fund was the same identical thing. Nobody could draw money out of that except who was told to.

Q. Except who was told to—what do you mean?

A. Well in this case apparently it was Bobby Coughlin who was told that he could draw checks on that fund.

Q. Well, as a matter of fact, Bobby Coughlin was the only one authorized to draw any checks on it, wasn't he?

A. That's what I said. He must have had authority to do so.

Q. But he was the only one authorized to draw checks on that fund? [174]

A. I don't know if he was or wasn't.

Q. You don't know?

A. If he was the only one who was authorized to draw checks on it.

(Deposition of Neil F. Moore.)

Q. Well, didn't you look into the fund to determine whether you were going to close it or not?

A. We closed it because they were paying Territorial expenses illegally.

Q. How can you say that it paralleled the Oscar Olson situation if you didn't even look into it to see who was authorized to draw checks on the fund?

A. That is another problem, but checks were being drawn on this particular fund, by Bobby Coughlin in this case. In the other case Oscar Olson was drawing funds out of a special fund. So you have two special funds—one was handled by the Treasurer and one by the Road Board, and one is being drawn on by the Treasurer to pay everything and anything that he saw fit. The same thing on the other side—it is a parallel case.

Q. No check was ever drawn on this fund by Metcalf, Roden or Gruening, was it?

A. I don't know.

Q. Well, didn't you look to see?

A. I only saw the one check.

Q. Well, then, how can you say it was a parallel case? [175]

A. It was a device. The device was similar in both respects, in both cases. I told the Attorney General that here was a case similar to the one that had just been cleaned up.

Q. If the checks had been drawn on the Motor Fuel Tax earmarked Fund, you would have approved the vouchers, wouldn't you, for operating the Chilkoot Ferry?

(Deposition of Neil F. Moore.)

A. Yes, if they were legal.

Q. The checks drawn on this fund were used to pay the same expenses, were they not?

A. Yes, but there is a law that says they couldn't do it.

Q. Well, then, how can you call this special device similar to Olson's?

A. Because it by-passed the channels that were set up by the Legislature for the payment of Territorial expenses, the same way on the other side.

Q. Well, what grounds did you have for stating that this paralleled the Olson case in imputing fraud? A. Who had control over it?

Q. Did you know? A. No, I didn't know.

Q. But you immediately went out and said it closely paralleled the——

A. That's right; it did.

Q. You would have done almost anything to bring the Gruening group into disrepute, wouldn't you have? [176]

A. I didn't have to do anything. They did it all by themselves.

Q. You did all this, though, to do it, didn't you?

A. Well, I called a halt to it; yes. I didn't do it by myself. I had the Attorney General with me.

Q. Now, you say the Attorney General approved it, did he? A. What?

Q. John Dimond, you say, the Assistant Attorney General—— A. To stop it?

Q. Yes. A. He was right with me.

Q. Did he do it? A. What?

(Deposition of Neil F. Moore.)

Q. Did he do it?           A. Did he do what?

Q. Did he cause the funds to be frozen and stop payment——

A. He was with me when we talked to the bank. That stopped the funds from being spent.

Q. But you were the one who told the bank to close the fund or freeze it, weren't you?

A. I was with John Dimond. I don't know if it was him or me or both of us.

Q. You don't know?

A. I don't recall. That is over three years ago.

Q. Well, now, didn't you testify just a bit previous here [177] that the device was similar to that of the Olson situation because in the Oscar Olson case only he could draw on the fund?

A. The parallel is this: that here were two bank deposits, one made by the Treasurer and one made by the Board——

Q. Will you please answer that question?

A. All right. It was money that should have been put in the General Fund and was not put into the General Fund in both cases; it was put into a special bank account. Checks were drawn on it in both cases. There is your parallel. It doesn't matter who drew the checks. They were drawn illegally, deposits made illegally, because the deposited money should have gone into the funds that were set up by the Legislature and they weren't, and the money was not deposited to the fund in both cases.

Q. But I thought you just testified previously that the deposit was legal?

(Deposition of Neil F. Moore.)

A. At the time they said it was, but then I got an opinion.

Q. But you didn't have the opinion at the time you talked to Mr. Daum when this article was printed, did you? A. Oh, yes I did.

Q. The opinion of the Attorney General?

A. That the money from the Chilkoot Ferry was supposed to go to the General Fund.

Q. Well, what would that be? Information that would cause [178] you to believe that it was an illegal deposit?

A. Well, it goes like this: if the money had been deposited into this special bank account and held for any particular reason that the Road Board thought was necessary to hold it for a short period of time, the money should then have been taken from that account and turned over to the Treasurer to go into the General Fund. It could not have gone into the Gas Tax Fund under that particular opinion, but it never was transmitted until this thing happened.

Q. Transmitted—you mean to the General Fund? A. Yes.

Q. Until this thing happened?

A. Until it came out in the paper.

Q. Well, the funds were frozen then, weren't they?

A. That's right, they were frozen and they stayed frozen for I have forgotten how long, but eventually the Attorney General and the Treasurer, I think—somebody—got together and they worked

(Deposition of Neil F. Moore.)

out a system of how they could get the money transmitted into the General Fund, and I think that is where it went, what was left of it.

Q. Well, now, will you go back and answer my question. I am putting it to you for the third time. Didn't you testify here previously this evening that in the Olson situation the Territorial Treasurer, or Olson, was the [179] only one who could draw monies out of the fund?

A. He fixed it that way; yes.

Q. How did he fix it that way?

A. I don't know what he told the bank.

Q. What sort of an account was it?

A. What?

Q. What sort of an account was it?

A. It was just a special fund and all forms of taxes were dumped into it.

Q. Did it have a label?

A. It might have been Oscar Olson, or it might have been Oscar Olson, Territorial Treasurer, I don't know.

Q. Is it your testimony now then that he was the only one who could draw upon the fund?

A. Well, apparently so, because the checks that anyone else wrote on his behalf were signed by that person for Oscar G. Olson, or "Oscar G. Olson by so and so."

Q. Well, then others could draw on the fund, couldn't they, by writing a check, signing Oscar Olson and their name, "by"?

A. They were his employees.

(Deposition of Neil F. Moore.)

Q. All right. How was that similar or where does that situation closely parallel this one, where Robert Coughlin is the only one authorized to draw on the fund?

A. But was Robert Coughlin the only one that was authorized? [180]

Q. Didn't you check the fund?

A. I don't know who was authorized. I didn't see the minutes.

Q. Well, then, how can you speak indiscriminately and say to Mr. Daum that the case closely paralleled the Oscar Olson case without any investigation?

A. I am saying the parallel is this: there were two——

Q. That isn't the question. Please answer the question.

A. Regardless of who drew the checks or who deposited them, you had two accounts in the bank not authorized. Money is dumped into it; withdrawals from both of these accounts. There is the parallel. Now who did it or didn't do it—that has nothing to do with what I was telling the Attorney General. I was pointing out to him that here is another account similar to the one that had already been cleared up, with withdrawals similar to the other one. There is the parallel.

Q. But you knew at that time that Oscar Olson had admitted his guilt of defrauding the Territory of funds properly in his possession, didn't you?

A. Yes.

(Deposition of Neil F. Moore.)

Q. And you said this case closely parallels the Oscar Olson case?      A. Yes.

Q. Implying that the three members of the Board were defrauding [181] the Territory, didn't you?

Mr. Faulkner: I object to that question.

A. I didn't say they were defrauding the Territory. I just said the device was similiar.

Q. You haven't pointed out wherein it was similiar. You don't know who was authorized to draw on this checking account.

A. It doesn't make any difference. The device was the same in both cases. There is your parallel. It was up to the Attorney General, if he wanted to follow through, to find out who was wrong and who was right. Here is the device which is being used. There is the parallel.

(Reading suspended.)

Mr. Nesbett: Just to interrupt a moment, your Honor, with respect to these objections. I noticed your Honor might be making notes. We have stipulated that—Mr. Faulkner wanted to permit Mr. Moore to go on "Outside"; he was no longer going to live in the Territory—and the deposition would be admitted regardless of the form of any question, and so any objection that Mr. Faulkner makes during the reading of the deposition is waived in the stipulation.

The Court: I take it in the reading of all these



(Deposition of Neil F. Moore.)

depositions that objections made at the time of taking are waived unless they are renewed here?

Mr. Kay: Right. [182]

Mr. Faulkner: We don't have any, your Honor.

The Court: So that, if any objections were made, that you would make them.

Mr. Faulkner: We haven't any.

(Reading resumed by plaintiffs.)

Q. Why didn't you say that the account was an unauthorized-type account rather than compare it to a case of admitted fraud and admitted guilt?

A. How did I know? There is three hundred dollars short.

Q. You didn't know it then?

A. Well, I know it now.

Q. You didn't know it then?

A. Well, here is something else that is wrong with it, then. Here I knew that payments were being made out of it. Every single payment made was illegal.

Q. You only knew of one payment at that time?

A. One was all that was necessary.

Q. You only knew of one payment at that time, didn't you, that is, a proposed payment to Steve Homer?

A. The check was written and was all that was necessary, because that certainly would lead you to believe that others had been made.

Q. Actually, you knew that the account had been in existence for months, didn't you?

(Deposition of Neil F. Moore.)

A. No. [183]

Q. Back to the time when the vouchers for payment out of the Motor Fuel Tax Fund had ceased to come through your office?

A. I didn't know payments were being made from it until this check was brought to my attention.

Q. Maybe you didn't see any actual checks on it, but you knew the fund existed and that they were paying expenses in some manner, didn't you?

A. Sure they were paying them on the vouchers, because I was getting vouchers.

Q. You weren't getting vouchers the last two or three months, were you?

A. I don't know if they were or not.

Q. You hadn't been getting any vouchers to be paid out of the Motor Fuel Tax Fund for several months prior to the check for Steve Homer on the Chilkoot Ferry Fund?

A. I must have been. If I hadn't, it didn't concern me too much, because as I said before, we might be a month or two months in some cases getting expense vouchers in for some of the offices. A lot of the offices hold them up until the end of the month, or whenever they get enough. We might get two or three hundred of them at a crack. The big departments, for instance, they will send theirs in once a week, not day by day, but once a week. Some of the others maybe once a week, and some send them in [184] as they write them, maybe one a day.

(Deposition of Neil F. Moore.)

Q. Actually you knew that fund existed for some time, didn't you?      A. No, I didn't.

Q. And that they were not paying the expenses out of the Motor Fuel Tax Fund by submitting vouchers to you for several months prior to the running across of Steve Homer's check, and you held it up so that you could break the news to the Daily Alaska Empire just before election time?

A. No. I can answer that just plain "no."

Q. All right. Tell me about this three hundred dollar shortage. Where did that occur in the fund?

A. When the auditors got through there was three hundred dollars short.

Q. Did you check with the auditors to see where it might occur?

A. I asked them. It proved out three hundred dollars short.

Q. That audit was made at the end of 1952, was it?      A. Yes.

Q. Was the check of Steve Homer ever cashed out of that fund?      A. No.

Q. Was that money ever paid to Steve Homer?

A. As I understand, the Legislature had to pass a special [185] act to pay him.

Q. You were Auditor when the result of that audit came out, were you?      A. Yes.

Q. Did you do anything about the three hundred dollar shortage?      A. Yes.

Q. What did you do?

A. Gave it to the Attorney General.

Q. What did you say?

(Deposition of Neil F. Moore.)

A. I called it to his attention that there was three hundred dollars short and that eleven or twelve thousand dollars in illegal payments were made. I don't know what else, but that was the gist of it.

Q. What did the Attorney General say to you or do about it?

A. He didn't say anything to me.

Q. He never answered your letter?

A. I don't recall if he did or not.

Q. Well, did you let the matter drop right there?

A. It was his baby then. I couldn't do anything more.

Q. Well, you don't know whether he answered your letter or not?

A. I don't recall. He may have answered it, but I don't recall what else he did.

Q. Did you ever talk with the auditors, Anderson and Company? [186]

A. About what?

Q. The result of their audit which showed a shortage.

A. Well, yes, I always went over it with them. It isn't the first audit they ever made. We used to go over all of them to see that we both understood one another.

Q. Where did the shortage occur?

A. Well, they collected three hundred dollars apparently in fares or on freight, and there is no record of it other than what Arthur Anderson and Company found, and where they found it I don't know.

(Deposition of Neil F. Moore.)

Q. Are they in Seattle? A. Yes.

Q. Arthur Anderson and Company?

A. Yes.

Q. Do you happen to recall their address?

Mr. Faulkner: Arthur Anderson and Company, Dexter Horton Building, Seattle, Washington.

Q. A regular complete audit report was made to you on that fund, wasn't it, Mr. Moore?

A. Yes. It isn't what they call a detailed audit, a balance sheet. That would include all the departments that handle money.

Q. All the departments that handle money?

A. Yes.

Mr. Nesbett: I think that is all. [187]

(Reading concluded.)

Mr. Nesbett: That is all of the deposition of Neil Moore.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Nesbett: Your Honor, at this time we would like to publish the deposition of Jack E. McFarland, formerly an employee of the Empire, taken in Anchorage, Alaska, on October 1, 1955.

The Court: Very well.

Mr. Nesbett: Appearances were Buell A. Nesbett, of Attorneys for Plaintiffs, and Norman Ban-

field, of Attorneys for Defendant. "Jack E. McFarland being first duly sworn upon oath, deposes as follows on Direct Examination by Mr. Nesbett:"

(Whereupon, the deposition of Jack E. McFarland was read as follows—questions by Mr. Nesbett and answers by Mr. Kay:)

### DEPOSITION OF JACK E. McFARLAND

(Reading.)

Q. Is your name Jack E. McFarland?

A. Jack E. McFarland.

Q. McF-a-r-l-a-n-d? A. That is right.

Q. What is your profession, Mr. McFarland?

A. At the present time I am teaching school.

Q. And where are you employed?

A. For the Territory of Alaska at Nondalton, Alaska.

Q. And I will ask you whether or not you were employed by the Empire Printing Company in Juneau in the year 1951-52? A. I was.

Q. And in what capacity were you employed there?

A. First as a reporter covering the Federal Building and general reporting, feature writing, and later as managing editor.

Q. Mr. McFarland, do you recall the dates of your employment with that corporation?

A. From October 1, 1951, until late in the sum-

(Deposition of Jack E. McFarland.)

mer of '52 and I don't know my exact date of termination.

Q. Can you state the month of termination?

A. I——

Mr. Banfield: August 9, Jack. I looked that up.

A. Thank you.

Q. Now, Mr. McFarland, had you had any newspaper experience prior to going to work for the Juneau Empire?           A. Yes.

Q. Will you state briefly the experience you had had in newspaper work prior to working for the Juneau Empire?

A. Well, my first full-time job, other than working around [189] various small papers, was with the Wichita Beacon, a daily, at Wichita, Kansas.

Q. In what capacity were you employed by that paper?           A. As reporter and night editor.

Q. State any other newspaper experience you have had, if any?

A. Leaving the Beacon I went into the Marine Corps. After my service with the Marine Corps, I got out in January, 1945, I went to work at Halstad, Kansas, for a weekly, The Halstad Independent. I was employed there for approximately 2 years and again I don't know the date of when I left there.

Q. Did you have any newspaper experience subsequent to working for the Halstad Independent?

A. I left the Halstad Independent to go to work for the Hutchinson News Herald, a daily.

(Deposition of Jack E. McFarland.)

Q. And in what capacity were you employed there?

A. I was a reporter for the courthouse with the Hutchinson News Herald and I was employed there for about a year at which time I quit for the purpose of trying my hand at free-lance writing. My wife and I moved out to Colorado. We bought a very small business out in Fairplay, Colorado, and I spent considerable time working with the Court County, a small paper there. I was hired as a publicity man for the then big celebration they had each [190] year there and I did writing for the Rocky Mountain News and the Denver Post, both Denver papers.

Q. Now, Mr. McFarland, will you state the circumstances connected with your going to work for the Juneau Empire?

A. Well, I was hired by Mr. Beard on the telephone—before then I had worked for another small paper in Colorado and had gone to Denver as public relations man, press relations man for Gates Rubber Company, which entailed work that I did not exactly care for, which was turning news stories over to the Denver papers which sort of patted Gates on the back and it soon became rather depressing to me. So I wrote letters to Alaska. Having long wanted to come up here I wrote letters to Alaska papers. I received replies from 2 or 3 of them; one of them from the Daily Alaska Empire, and it sounded favorable and I answered their letter. The letter was from James Beard. I said



(Deposition of Jack E. McFarland.)

that I would like to come, but I wanted to know more detail about what the work would be and in a day or 2 after there had been time for him to receive my letter, I guess, I got a call at the office of Gates Rubber Company. The switchboard girl said, "Mr. McFarland, you have an overseas telephone call." Everyone was very surprised and, frankly, I was rather embarrassed. I had to take the call in front of my boss and fellow employees there, but I did and I accepted the [191] job, although I had to give notice to Gates.

Q. Now, prior to coming to Alaska to work for the Daily Alaska Empire, did you have any knowledge of the political situation in Alaska?

A. None at all.

Q. After arriving in Juneau were you given any instructions by officials of the Daily Alaska Empire with respect to editorial policy in connection with your political reporting?

A. Yes, I soon found out—well, I remember that the Denali Alaska Steamship boat docked there at Juneau at night. I remember it was very rainy. I remember Beard met me at the gangplank.

Q. What was Mr. Beard's capacity with the Empire?

A. He was formally business manager, however, he had rather strange power around there. He was more or less in control of all the functions of the paper, although Helen Munson, of course, was the boss of the whole operation.

(Deposition of Jack E. McFarland.)

Q. Mr. McFarland, go ahead with your answer in connection with Mr. Beard?

A. Beard met me at the dock. We went over to Mike's for a midnight snack and a few drinks and he was very happy for me to arrive. I would not have any preconceived notions of the political scene, according to him, and he felt that I would be just the man to help him in this [192] job, which seemed to be the main purpose of the paper at that time to find something which would either cripple or embarrass the Gruening Machine and talk with Beard that night was rather long and nearly all concerned what had to be done to find something on the Gruening Machine, Gruening and his co-workers. After that I met Helen Munson the next day.

Q. I will ask you whether or not you received any instructions from Helen Munson with respect to editorial and reporting policy as concerned the Gruening administration?

A. Well, it was always first there. It was always with Jim and Helen together. I was with them a great deal.

Q. Now, Jim is Jim Beard, is it?

A. Jim Beard, yes.

Q. And Helen is Helen Munson?

A. Yes, sir.

Q. What was Helen Munson's connection with the Daily Alaska Empire?

A. She was publisher and majority stockholder.

Q. Now, go ahead and answer the question.

(Deposition of Jack E. McFarland.)

A. Well, Mrs. Munson and Beard seemed to be giving me an indoctrination course. That is the way it appeared to me, and, frankly, I was green. I was interested. I wanted to know everything, however, from their viewpoint. [193] I only got one side of the story, of course, and that was that Gruening and most of the people who worked under his administration were absolutely no good and it was a machine that had to be broken up for the good of Alaska. That took place over some time. It was a matter of talking over a few drinks in Mr. Beard's apartment and at Helen's house, out to dinner together, a party here and there, and other people were drawn in to help me get started on the right track, I guess, such as Mark Jenson, he is a senator, and Pete Gilmore, who is a lobbyist for the Salmon Industry, and other people.

Q. Will you explain what you mean when you say Mark Jenson and Pete Gilmore were brought in to assist Mrs. Munson and Mr. Beard?

A. Well, that was my impression and they were brought in and introduced to me with such remarks as "Here is somebody that can give you the right dope now." That was the trend to get me started right there so I would know what the true picture was concerning the political scene in Alaska because I was—I might say, I was brought up to be the managing editor and they wanted someone they could trust.

Q. Mr. McFarland, I will ask you whether or

(Deposition of Jack E. McFarland.)

not Helen Munson ever expressed any personal opinion of Governor Gruening to you? [194]

A. She did at several times, yes, and it was with the utmost hatred. There were at least two specific times that I can remember where she said something of the sort that Gruening was absolutely no-good and anything that could be done to get him out of there was not unethical to do it which was the reason that question came up, when I questioned certain policies, and I might say there was some heat with her remarks concerning Gruening. It was not a matter of calm instruction to me. Her remarks were made with evident feeling of hatred and dislike.

Q. Can you state the degree of hatred she exhibited to you in these remarks concerning Governor Gruening?

A. It was quite vehement and it was a hatred which seemed to me to border on psychosis. Now, I am interested in psychology, but I don't claim to be an expert, but certain things would make anyone realize that, I believe. There could be no joking or humorous talk with her about Gruening. It all had to be serious. Any mention of his name was likely to bring on a, I would say, an angry flush to her face. It was something that I don't believe I had ever seen before—such an intense hatred of anyone and it was undoubtedly deep seated. I don't know what the original motivation was, but I have noticed when, at certain events, Governor Gruening might be one of the [195]

(Deposition of Jack E. McFarland.)

speakers of the evening and she was present off-hand humorous remarks by Gruening which might bring chuckles from anyone else only brought an angry flush to her face and it evidently made her unhappy that other people thought it was funny.

Q. Now, Mr. McFarland, I will ask you whether or not Mr. Beard ever expressed any personal opinion of Governor Gruening and his administration to you?

A. Many, many times and I would say that Beard's feelings on the subject were not the same as Mrs. Munson's, although his efforts were very intense toward trying to discover something that might embarrass Governor Gruening or his administration, but he had a very scheming attitude about the whole thing and it was not like Helen's—a deep hatred in the man. I have heard him say that he is probably one of the smartest men in Alaska and said, "All the more reason we have got to do something about it," and well, the whole purpose of the paper, while I was there, as far as I could see, was to get something on Gruening and the administration. The business end was going to pot and it was obvious to everybody and whether there was money in the bank was not important, it seemed to me. If there was something in the news that tended to embarrass Gruening and his administration that made up for all the deficit, I think. [196]

Q. Mr. McFarland, I will ask you whether or not Mr. Beard ever expressed any opinion of Frank Metcalf personally to you?

(Deposition of Jack E. McFarland.)

A. Oh, yes. I might say that Beard thought that Metcalf was incompetent, if not crooked and I can recall him talking about Mr. Metcalf being a stupid son-of-a-bitch and no-good. Another thing I would like to say here which seems to me to show how low Beard was in his attitude, I remember at one time I accompanied Beard to the Democratic meeting over in Sitka. It was a convention.

Q. Do you recall the approximate date?

A. It was—should have been about November of 1951.

Q. Go ahead.

A. And I walked into Bob DeArmoun's shop over there with Beard and Bob and Beard greeted each other very cheerfully and the first remark of Beard's was, "Well, Bob, have you thought of any way we can get that God-damn kike out of office yet," and DeArmoun's remark was, "No, but we should have a chance to work on it."

Q. Now, I will ask you whether or not Mr. Beard or Mrs. Munson ever expressed any personal opinion of the plaintiff, Henry Roden, to you?

A. I can't answer that except for hearing Helen talk about Henry and being with Helen when she talked to Henry. I [197] would say that Mrs. Munson had some regard for Mr. Roden and I don't know that she had any feeling about Henry except that, I believe, since this business came up that since Henry was under Gruening, that whether he was a friend or not did not make any difference with her, or at least not enough to prevent his being

(Deposition of Jack E. McFarland.)

involved as long as something could be done to get Gruening out of office.

Q. I will ask you whether or not Mrs. Munson ever expressed any opinion of Frank Metcalf to you?

A. I can't answer that. All I can answer is that I don't know, except, I mean, there was a whole run-down from time to time about who was okay and who was not okay and I suppose Frank's name was mentioned.

Q. Would you state that Frank's position, as far as Mrs. Munson was concerned, was somewhat to that of Roden or any other official connected with the Gruening administration?

A. I would say it was somewhat different. My opinion is that I don't believe Mrs. Munson cared a great deal for Frank Metcalf. I just cannot say anything specific to support that, but I do know she did have some regard for Henry Roden and I don't believe she did for Frank Metcalf. They both fell into the same category eventually so— [198]

Q. I will ask you whether or not you had, during the period of your employment, differences of opinion with Mr. Beard and Mrs. Munson over their editorial and reporting policy as concerned the Gruening administration?

A. I certainly did have. It began not too long after I was there but I always felt that something could be changed around there to make that Daily Alaska Empire the paper that it should be. I wanted to try to help make the paper it should be for the

(Deposition of Jack E. McFarland.)

capital city daily paper, but arguments did go on from the time I took over the desk until the time I quit because there was one scene after another around there. I might say, even before then I did a very bad job of covering the Federal Building simply because I could not write what I thought was the news of the day because I never knew what Helen was going to say about what I wrote about the various officials. What I mean is, your job as a reporter is to interview your officials on your beat. Well, if I were to interview Governor Gruening or George Sunborg or Frank Metcalf or others I never knew how Helen would feel about what I had written, although I was reporting the news as it was given to me at least and what I saw.

Q. Mr. McFarland, will you state as nearly as you can when the first such difference of opinion and argument arose?

A. The first serious breach was before I took over the desk. [199] I cannot recall the exact date. I could check very easily. It was the date of the publication of the photographic reprints of the pages of the California Investigating Committee's book on Un-American Activities purporting to show that Governor Gruening had been tied up with Communist front organizations and I felt it was a very low, very unethical thing to do because these—well, it was just the plain tactics that McCarthy used, which to me was entirely wrong, and they gave Gruening no chance. They blasted—he was all over the front page and with headlines which



(Deposition of Jack E. McFarland.)

seemed to make it no doubt that he was a Communist and we had him as Governor in office and I felt very strongly that that was wrong as far as government practices went and I argued with Beard about that; to no avail, of course. It went in the paper. The next day my job was to go up and ask Gruening whether he was now or ever had been a Communist and I don't believe he hid behind the 5th Amendment, but I forget what his answer was at the time, but it was the evidence that they produced which was actually so flimsy that I, and the sources from which it came——

Q. What were those sources?

A. As I subsequently learned this so-called discovery that Gruening had been connected with organizations which were somewhat subversive came from, well, what I consider [200] a wild-eyed fanatic in the mid-west. I don't remember the man's name. He did have a radio program out of Tulsa, Oklahoma, I believe. He is a very wealthy man and is in the oil tool business, I believe. I can't recall his name now, however, I do recall seeing a letter written to Beard by this man commending him for his publication and offering further help and probably from—now here is where my memory fails me—it was either Gerald L. K. Smith, or Gerald Winrod, both of whom have been condemned, by at least as many people, of certain Communist ideas.

Q. Can you state whether or not any of these so-called sources had criminal records?

(Deposition of Jack E. McFarland.)

A. I believe that Winrod was convicted during the war of—I can't state the charge. He was found guilty, I believe, of—it was against the war effort, at least, or something like that.

Q. Can you state any other instances where you had differences of opinions and arguments with Mr. Beard and Mrs. Munson in connection with their reporting and editorial policy as concerned the Gruening administration?

A. It went on from day to day, of course. Sometimes maybe we would stay clear of each other for a week or two and at other times it was just a constant battle around there. However, the next major thing that I recall, as [201] I remember now, was during these—something about this Palmer Airport case up here. Now, when the story originally broke I was not at the Empire. That was before my coming there. However, there was some decision made by the Comptroller General of the United States while I was on the desk there and some very brief wire story came through concerning the Palmer Airport and I believe that it was a decision which was adverse to its successful transaction. At least it was encouraging to Beard and Mrs. Munson and there was some happiness over it, as I remember. Something about the Comptroller General had made a decision to not pay for the land, but to pay for certain other costs, but not the major cost. But it was the story, it was probably a 2-paragraph story, and when Beard saw that he wanted it splashed all over the front page. I told him it seemed im-

(Deposition of Jack E. McFarland.)

portant enough to me all right, we should have it prominently displayed, but the story itself would not carry a big headline. It was a small story and I sent it out to the back to be set in bold-face type. I intended to place it in a box up in the upper right-hand corner of the paper. That did not satisfy Beard at all. He wanted a banner headline across the front page that the decision had gone against Gruening and we had a very hot argument about it and I offered my desk and chair to Mr. Beard, saying that if [202] he wanted to run the paper he better sit there and run it.

Q. What was your objection to giving the story the prominence Mr. Beard apparently desired?

A. Well, it was not that much of a story. I had no feeling about it one way or the other. In fact, I did not and still don't know the details of the case, but it was not important enough story to be given more than what A.P. gave it with perhaps a little background on it. A banner headline on a story like that would be plain ridiculous and would make the paper look ridiculous and very biased, which, of course, it was intended to be by Beard and Helen. When I say Beard, I mean that he was the errand boy between the newsroom and the front office as much as he was the general manager and he would confer with Mrs. Munson about these things at times and at other times he would tend to make the decisions himself. Whether Mrs. Munson was even in town at that time I don't know, but at any rate, we had a real falling out over that and

(Deposition of Jack E. McFarland.)

I don't believe we had a whole lot of social contact after that because it was obvious that we couldn't agree about what was right and what was wrong with the newspaper.

Q. What objection did you have in general with the reporting policy sponsored by Mrs. Munson and Mr. Beard?

A. Well, just too many attempts for distortion of facts and [203] to me unethical procedures in the newspaper business. My idea of running a newspaper is to get all the news that you can, print and present it as fairly as you can, and if you want to say—whatever you want to say, say it in your editorial column; that is your business and probably part of the function of a newspaper, but it is not the function of a newspaper to editorialize in all the news columns and it was done time and again in the Empire, directly and indirectly, by the emphasis given certain stories and like emphasis given other stories. Now, that goes against any newsman and I never worked for a paper before where that was done. I might say that it is an odd thing, and I never thought about it until just the other day, but the Daily Alaska Empire was the first Democratic paper I ever worked for. All the rest had been Republican papers, and I had never seen that much bias on any papers that I have worked for.

Q. Mr. McFarland, will you state why you left the employment of the Daily Alaska Empire on August 9, 1952?

(Deposition of Jack E. McFarland.)

A. Well, it was a combination of another argument which had no way of being resolved.

Q. What was that argument about?

A. It again concerned the Gruening gang. Governor Gruening had just returned from the Democratic Convention of 1952, National Convention, where Adlai Stevenson was nominated [204] and he had been on the scene, and I thought it would make a fine story getting a local person's picture of what had happened back at the National Convention. Since Juneau is rather political minded I was sure the story would be widely read. I sent one of my reporters, Erv Jenson, to talk to Governor Gruening about his experiences at the Democratic Convention and he got a long interview with Governor Gruening and I thought it was very interesting and it was the best story of the day as far as I was concerned. I think if we could check back we would find out there was nothing else that good of a story for the day, and I ran it in the top position in the paper and there was certainly an emotional explosion around there when the paper came off the press. Helen acted as I had never seen her act before. She tore into the newsroom and slammed the paper down and she was almost in tears, in hysterics. She was hysterical and saying she had never, never thought she would see any such thing in her paper and why did I do it to her and—oh, she was very upset and I tried to reason with her, which was always a futile thing where Governor Gruening was concerned, but she said that nothing like that should

(Deposition of Jack E. McFarland.)

ever be in her paper; that Governor Gruening was no-good and, oh, she said a lot of things, that he should be exterminated and such things as that, but at any rate I [205] got no satisfaction in talking to her and I offered her my job, that I would quit, and I don't believe that she was hardly aware that I was telling her that I would quit, but I did talk with Beard and he agreed and raved and ranted about what a terrible thing I had done and I told him that it was time that I left there I thought and that I thought they should get someone else and he better just fire me. Well, I will say now that I tried more than one time to get Beard to fire me. I had had enough and I really didn't want to quit. I wanted to do a job there and it was eternal optimism, I guess, I thought perhaps I could, but I did try to get Beard to fire me and he wouldn't fire me. My motive for trying to get him to fire me was probably confused—I hadn't been there a year and I thought I might as well get out of the Territory and since I hadn't been there a year the Empire would probably have to pay my way back down to the states if I was fired rather than quit and he wouldn't fire me so I quit and I gave him 2 weeks' notice.

Q. Now, is it your testimony then that the editorial and reporting policy of the Daily Alaska Empire continued up to the time you quit on August 9, 1952?      A. Then and after then, yes.

Q. Now, do you have any personal interest in the outcome of this case? [206]

(Deposition of Jack E. McFarland.)

A. None at all.

Mr. Nesbett: I believe that is all.

Cross-Examination

By Mr. Banfield:

(Reading suspended.)

Mr. Nesbett: Mr. Banfield representing the defendant.

(Reading resumed.)

Q. This Democratic Convention you spoke of, is that the one at which Gruening supported Kefauver so strongly and then came back and told you how he supported Stevenson?

A. He supported Kefauver strongly, I understand, but I don't believe that he said in that story that he supported Stevenson, although his personal likes were Stevenson.

Q. What do you think—he wrote the article?

A. Yes, he wrote the article.

Q. Gruening? A. Yes.

Mr. Nesbett: Off the record.

(Reading suspended.)

Mr. Nesbett: The next one is an answer.

(Reading resumed.)

A. Erv asked him for an interview and for his ideas on the convention and Gruening sat down and wrote the story of [207] the convention and gave it to Erv and I ran it.

(Deposition of Jack E. McFarland.)

Q. It was a very glowing account of Stevenson. wasn't it?      A. I believe it was.

Q. You wanted to send it back to Stevenson, didn't you?      A. Possibly.

Q. Jack, sometime after that you did get interested in some other newspaper in Juneau, didn't you?      A. That is correct.

Q. What paper is that?

A. Juneau Independent.

Q. And what company publishes that paper?

A. That is called News, Incorporated.

Q. How long had you left the Empire before you joined that paper?

A. Well, the first issue of the Independent came out September 3, I believe, and, of course, there was 2 weeks preparation or more.

Q. Well, you left the Empire with the intention of joining the Independent, too, didn't you?

A. Not really. As I say, I was ready to leave the Territory. I will tell you exactly what happened. Maybe this will clear it up. James Woodruff, who was circulation manager for the Empire at that time, wanted to know what I was going to do. I told him I really didn't know, that I would probably leave. [208]

Q. Then you did decide soon after that, however, did you, to help form the Independent?

A. Very shortly.

Q. Just to make it brief—

A. Yes, before I had—after I had given notice



(Deposition of Jack E. McFarland.)

and before I had quit I made up my mind to start the Independent, yes.

Q. You are still a stockholder of it?

A. I don't know how to answer that. I don't own any stock in it right now, although Mr. Sunborg owes me some money from the shares——

Q. Shares that you did have?

A. Yes, and if he doesn't pay me I can take the stock back.

Mr. Banfield: That is all.

A. One thing I would like to say here for the record though no one asked me, but it sounds ridiculous after what I said, but I have a great deal of personal regard for Mrs. Munson and I think she has some for me. I think she is a warm hearted woman and she is a fine person, but I do think she was, for some reason, misguided in her hatred for Cruening and it hurt her. That is about all.

Mr. Nesbett: No further questions.

(Reading concluded.)

Mr. Nesbett: That is all of the deposition. [209]

FRANK A. METCALF

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Will you state your full name, Mr. Metcalf?

A. Frank A. Metcalf.

(Testimony of Frank A. Metcalf.)

Q. Where do you reside, Mr. Metcalf?

A. In Juneau.

Q. And how long have you resided in the Territory of Alaska?      A. Forty-two years.

Q. And did you commence to reside in Juneau immediately upon coming to Alaska?

A. I came direct to Juneau; yes.

Q. And isn't it a fact that your entire residence in Alaska has been in or very near Juneau except when away on work?

A. With the exception of the World War; I was in Sitka for three years during the War.

Q. Mr. Metcalf, what is your profession?

A. Civil and mining engineer.

Q. Will you state briefly, give the Court briefly a biographical sketch of your background from the time you studied to become a professional engineer up to the present?

A. Well, I graduated in engineering and was later given a master's degree in civil. [210]

Q. Where did you receive that master's degree in civil engineering?      A. Cornell.

Q. And go on from there, Mr. Metcalf.

Q. I was with the Milwaukee Railroad on the early work in the Bitter Root Mountains in Eastern Washington and on location and then I went to work for the Bunker Hill and Sullivan Mine in Warner and transferred from there to Alaska Juneau in Juneau. I worked for them for two years, three years probably. Then I went into work for myself.

(Testimony of Frank A. Metcalf.)

Q. And what was the nature of your self-employment?

A. General engineering, surveying and patent work on mining claims, anything that required an engineer's report.

Q. I will ask you whether or not you have a wide acquaintance in Southeastern and all over Alaska?

A. I would say, yes, I did—I have.

Q. Now, as of September 25, 1952, isn't it a fact that you were the Territorial Highway Engineer, Mr. Metcalf?

A. Yes, I was.

Q. And when did you first assume that office?

A. I was appointed to the job to fill out the term, the unexpired term, after the death of Leonard Smith, who had been the Highway Engineer prior.

Q. And in what year were you appointed? [211]

A. I think that was in '47.

Q. I will ask you whether or not you subsequently ran for election for the office of Territorial Highway Engineer?

A. I ran for election the following spring.

Q. That would be in 1948, Mr. Metcalf?

A. It was the first election after that, I know.

Q. Were you elected?

A. I was elected; yes.

Q. For what period of time?

A. For a four-year period.

Q. And I will ask you whether or not you served during the entire four-year period as Territorial Highway Engineer?

A. Yes.

(Testimony of Frank A. Metcalf.)

Q. And at the coming of the next election for that office did you run again?

A. I ran again the next election.

Q. And in what year was that, Mr. Metcalf?

A. That was in '53.

Q. Well, the election, what year was the election in? A. Well, the election was in '52.

Q. Do you recall the month in 1952?

A. It was in November.

Q. Well, now, are you sure it was November, or might it have been October?

A. Well, it was in the fall elections. It would be October, [212] I believe.

Q. It is a matter of common knowledge, isn't it, that the election was held in October?

A. Yes. But I held office until the first of April the following year.

Q. Of 1953? A. Yes.

Q. Were you elected in the election of 1952-53?

A. I was defeated in the fall election; yes.

Q. And who defeated you, Mr. Metcalf?

A. The present incumbent, Mr. Reed.

Q. Now, I will ask you whether or not Mr. Reed was your opponent in the primary election for the office of Territorial Highway Engineer?

A. Yes, he was.

Q. Can you state, roughly, by refreshing your memory from these papers I hand you, the relative vote standings between you and Candidate Reed at the conclusion of the primary election?

A. At the conclusion of the primary I received

(Testimony of Frank A. Metcalf.)

10,703, and he received 8,170, leaving a majority of 2,533 in the primary.

Q. Pardon me. Will you repeat that please—the majority what?

A. That was a majority of 2,533 in the primary. [213]

Q. In whose favor?           A. In my favor.

Q. And can you state the results of the general election for the office of Highway Engineer?

A. In the general election he received 12,528, and I received 11,907, leaving a difference of 621 in his favor.

Q. Now, that was the general election of October of 1952, was it not, Mr. Metcalf?

A. Yes, sir; it was.

Q. Now, after you left office—did you say you left office in April of 1953?

A. The termination of my term; yes.

Q. Did you then commence to practice your profession, that of civil and mining engineer?

A. Yes.

Q. And were you immediately employed after leaving office in April, 1953?

A. I was that summer; yes.

Q. Well, then, what month, can you recall, in the summer of '53?           A. Well, it wasn't until July.

Q. And what was the nature of your work from July onward?

A. I was with the Admiralty Alaska Gold Mining Company on Admiralty Island.

Q. What was your salary, Mr. Metcalf, as Ter-

(Testimony of Frank A. Metcalf.)

ritorial Highway [214] Engineer during the time you held office?      A. Eight thousand.

Q. Eight thousand dollars per year?

A. Yes.

Q. And what was your monthly salary, approximately?

A. Well, I would say around seven hundred.

Q. Seven hundred dollars per month?

A. Take-home.

Q. Now, Mr. Metcalf, I show you a copy of Plaintiffs' Exhibit 1, the front page of the Daily Alaska Empire of September 25, 1952, and ask you if you recall seeing that edition on or about that date?

A. Yes, I do.

Q. Will you state your first reaction after reading that portion of the front page concerning the operation of the Ferry Chilkoot?

A. Well, I can certainly say I was deeply hurt, to start with, having lived in the Territory all this length of time, to have my name spread over the front page of a paper as being a crook and compared to an admitted criminal.

Q. Mr. Metcalf, was there such a thing as the so-called ferry fund?      A. Yes.

Q. Can you briefly give the Court a background, the Court [215] and the jury, a background summary as to how that fund was commenced and why it was commenced?

A. The year prior to this I had been operating, as a member of the Board, operating the ferry between Juneau and Haines on the Motor Fuel Tax.

(Testimony of Frank A. Metcalf.)

Q. Now, when you say the year before this, you mean the year 1951, do you?

A. The year 1951—which took a considerable amount of money from the, receipts from the Motor Fuel, and traveling over the Territory——

Q. Well, Mr. Metcalf, possibly it would keep it more in chronological order if I asked you questions. Did the Territory of Alaska buy this ferry called the Chilkoot?           A. Yes; it bought it.

Q. And in what month of the year did they buy that ferry?           A. In the spring of '51.

Q. Do you recall the month?

A. I think it was in May.

Q. Had the Territory owned the ferry prior to May of 1951?           A. No.

Q. Can you state to the Court and the jury why the Territory purchased this Chilkoot Ferry in May of 1951?

A. It was to close a gap between the highway of the Interior and Southeastern and it was to substantiate the promises and the advertising which we had done through the papers [216] in the States whereby people could make the connection from the highway to the Inside Passage and south.

Q. You mean advertising throughout Alaska and the States that people could drive over the highway system of the Territory and take their cars from Haines, the terminal of one branch of the Territorial highways, and travel to Juneau on the ferry, and subsequently to Ketchikan and on "Outside" on Alaska Steam?

(Testimony of Frank A. Metcalf.)

ritorial Highway [214] Engineer during the time you held office?      A. Eight thousand.

Q. Eight thousand dollars per year?

A. Yes.

Q. And what was your monthly salary, approximately?

A. Well, I would say around seven hundred.

Q. Seven hundred dollars per month?

A. Take-home.

Q. Now, Mr. Metcalf, I show you a copy of Plaintiffs' Exhibit 1, the front page of the Daily Alaska Empire of September 25, 1952, and ask you if you recall seeing that edition on or about that date?

A. Yes, I do.

Q. Will you state your first reaction after reading that portion of the front page concerning the operation of the Ferry Chilkoot?

A. Well, I can certainly say I was deeply hurt, to start with, having lived in the Territory all this length of time, to have my name spread over the front page of a paper as being a crook and compared to an admitted criminal.

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(Testimony of Frank A. Metcalf.)

A. Yes. That was our advertisement.

Q. I will ask you who operated that ferry prior to the purchase by the Territory in May of 1951?

A. I think Bob Sommers owned it prior to that.

Q. Then, is it your testimony that it was owned and operated prior to the purchase by the Territory by private individuals? A. Yes.

Q. Well, then, why did the Territory not permit those private individuals to continue to operate the ferry rather than have the Territory purchase it?

A. I don't quite get your question on that.

Q. Well, why didn't the Territory, or why didn't you as Territorial Highway Engineer, encourage Sommers to continue to operate the ferry rather than have the Territory buy the ferry and operate it themselves?

A. Well, he bought it for his own use. He had several [217] contracts in different sections of the country and he would transfer his machinery on this boat to the different places, but the strictness of the Coast Guard prevented his landing on the beach, and it became of no further use to him.

Q. I will ask you this. Did Mr. Sommers in the spring of 1951, prior to the purchase by the Territory, propose to operate that ferry between Haines and Juneau so that you could live up to your advertising promises?

A. Yes, he did, but his requirements were too stringent, and he couldn't meet them.

Q. Then, is it your testimony in essence that Mr. Sommers, as a private individual and owner of the

(Testimony of Frank A. Metcalf.)

ferry, was unable to operate the ferry as you needed to have it operated?      A. Yes.

Q. Was that the reason then for the purchase by the Territory?

A. Well, that was one of them. We had to maintain this service.

Q. Were there any other reasons?

A. Well, it was a part of our road system and was the cheapest maintenance of sixty-five miles of road that I could figure.

Q. After the Territory purchased the Chilkoot in May of [218] 1951, what method was used to defray the operating expenses of the ferry?

A. It came in on the Motor Fuel Tax.

Q. Now, what is the nature of this Motor Fuel Tax Fund?

A. It is two cents on a gallon for all motive fuel collected from all over the Territory.

Q. Now, in other words, the Territory taxes every gallon of gas purchased two cents and that money is paid into the Territorial Treasury into this fund?

A. Yes; and is used by the Alaska Road Commission, or Board of Road Commissioners.

Q. All right. Is this fund, called Motor Fuel Tax Fund, what is called or known as an earmarked fund?

A. It is an earmarked fund for purposes for which it is collected.

Q. And what is, in short, an earmarked fund, so the jury will understand it thoroughly?

(Testimony of Frank A. Metcalf.)

A. Well, it is collected for purposes, can be only used for the purposes for which it is collected. In this case it was for roads and harbors and harbor facilities.

Q. All right. Now, Mr. Metcalf, can you state, in brief, and not in great detail, how a disbursement would be handled from the commencement of the in-currence of the obligation to receiving final payment when the money was taken out of this earmarked Motor Fuel Tax Fund? [219]

A. The vouchers were written on and were turned over to the Auditor and paid by the Treasurer.

Q. And, as a general matter, how long did it take for those vouchers to be processed and the person entitled to receive payment to actually get his money?

A. Considerable time elapsed. It was not an immediate cancellation of the debt. It took sometimes weeks to get vouchers through.

Q. And, now, how were the receipts, that is, the cash receipts, from the operation of the ferry handled after the purchase in May of '51?

A. They were directed right into the Treasurer's Office. It didn't go through my office at all.

Mr. Faulkner: What was the question?

Mr. Nesbett: Will the reporter read it?

Court Reporter: "Q. And, now, how were the receipts, that is, the cash receipts, from the operation of the ferry handled after the purchase in May of '51?"

Mr. Faulkner: Thank you.

(Testimony of Frank A. Metcalf.)

Mr. Nesbett: And will you repeat the answer please?

Court Reporter: "A. They were directed right into the Treasurer's Office. It didn't go through my office at all."

Q. (By Mr. Nesbett): Then, Mr. Metcalf, after the receipts——

The Court: Is it a convenient place to stop, counsel? [220]

Mr. Nesbett: Yes, sir.

(Whereupon, the jury was duly admonished, and the trial was recessed until 2:00 o'clock p.m., November 16, 1955, and resumed as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: Before proceeding, I dislike to discommode you, ladies and gentlemen of the jury, but I would like to ask that you be excused for just a very few minutes, three or four minutes, while we discuss a matter, and then we will call you back. The grand jury room is now available for your convenience at any time.

(Whereupon, the jury retired from the courtroom; and the following proceedings were had:)

The Court: Is Mr. Allen in the courtroom? Mr. Allen, would you come forward please? I understand that you are the new publisher——

Mr. William Prescott Allen: That is right.

The Court: ——of the Daily Empire?

Mr. Allen: That is right.

The Court: Word has come to the Court, Mr. Allen, that you are offering to bet in public places on the outcome of this trial. I wonder if that is true?

Mr. Allen: Well, could I explain that, or do I just have to answer? [221]

The Court: Well, it can be answered yes or no.

Mr. Allen: Then I don't choose to answer.

The Court: Well, then it is the duty of the Court to admonish you that offering to bet upon the outcome of the trial in the progress of the trial before the Court is a contempt of court and——

Mr. Allen: I will stand on my constitutional rights if I have to answer.

The Court: Very well. Well, then I must admonish you that that is a contempt of court for which you can be punished and that you must desist from it. It is particularly dangerous if any such word might possibly come to the attention of the jury. It is also dangerous to make general comments about the town which may come to the attention of the jury. Surely, you must avoid that sort of thing. I am sure that you were not aware of any violation of ethics or conduct in offering to make such bets, and that is why we informed you that——

Mr. Allen: I didn't say that I offered it, and I offered to explain it, and you haven't saw fit to permit me that American privilege.

The Court: Why, you said you did not care to make a statement.

Mr. Allen: I said if I could explain it.

The Court: Very well; I am sorry. You said you [222] stood on your constitutional privilege and would not——

Mr. Allen: Constitutional privilege to make it and to be heard.

The Court: Well, yes; surely; if you wish to make a statement, you may do so.

Mr. Allen: I can make a complete statement explaining exactly what happened?

The Court: Very well.

Mr. Allen: You want me to make it under oath?

The Court: It is not necessary.

Mr. Allen: It will just take a minute, and I don't want to make a speech, but I want to make a statement.

I come here in June and bought this newspaper, and one of the first men I met was Mr. Roden, and, when I met Mr. Roden, I met him with Mrs. Monsen. I have been in this kind of business all my life, down here at Olympia, Washington, and on.

Mr. Roden told me what a fine man the former governor was, how he regretted being in a suit against—he was telling me: I wasn't telling him—how he regretted being in a suit against Mrs. Monsen, or the former governor's daughter, how the paper had favored him, how the governor had favored him, how the whole family had favored him, and he regretted it very much. There was no bet made. There was eventually, possibly. Now, he went on to tell me all this. Meantime I [223] had met the former governor.

The Court: Pardon me, Mr. Allen. Perhaps this

is not understood. The report that has come to the Court is your offering to bet here in Ketchikan during this session. Now, that, you say, you do not wish to state. I am merely admonishing you that——

Mr. Allen: I said, if I could make a statement, I will tell exactly what happened and how.

The Court: Well, all that we are concerned with is as to whether you are making these offers here in Ketchikan at the present time. That is all that the Court is concerned with.

Mr. Allen: I can't finish what I said with Mr. Roden?

The Court: Well, if it explains what you are doing now, yes.

Mr. Allen: Well, it does, because he is the man that I talked to.

So, I told Mr. Roden, I said—a day or two later—I was, you might say, in business with him, up to a point that I failed to have any confidence in him—I told him I wouldn't print his Journal any more, his Mining Journal, for a man that would make a statement that he didn't want to be in a suit against people that he loved and——

The Court: I think your statement is entirely out [224] of order. All that you were asked to state is whether or not you were making bets during the progress of this trial here in Ketchikan regarding the outcome of this suit, offering to make bets to the litigants or the parties representing the litigants. That is all that you are admonished that you should not do. Now, whether you have done it or not, I do not know.



Mr. Allen: Well, I am here for you now. You just go ahead and handle me like you have. I have respect for your court, totally. You handle me just like you want to handle me.

The Court: I must admonish you then, sir, that, if any repetition of offering to make such bets comes to the attention of the Court and if that is proven, that you will be punished for contempt of court.

Mr. Allen: Well, you can be assured that I will not make such a statement.

The Court: Very well. That is all we want to know.

Mr. Allen: Privately or otherwise.

The Court: That is all we want to know.

Mr. Faulkner: If the Court please, I didn't know about this. Mr. Nesbett just called my attention to it. But I want to state to the Court that I am very glad to have you admonish Mr. Allen or anybody else, because it is very embarrassing to me and to Mrs. Monsen to have anybody interfere [225] with the trial of this case outside of the trial. We are here to try the case, the two of us and nobody else. Nobody has any right in it at all or to try to go around bothering the plaintiffs. We haven't bothered them. We have the highest regard for them. It is unfortunate we have to try this case, but there is no animosity, and I don't want—I am sorry Mr. Allen did this; I am very sorry; and I certainly am glad that the Court called it to his attention, and, if there is anyone else on either side who steps out of line in this case anywhere, I want the Court to admonish

them, because we don't want to try a lawsuit that way. We want to try it only on the evidence.

The Court: Thank you, Mr. Faulkner; I am sure that you would not.

Will you call in the jury?

(Whereupon, the jury returned and all took their places in the jury box; whereupon the trial proceeded as follows:)

The Court: Do counsel stipulate that all the jury are present without the necessity of calling the roll?

Mr. Nesbett: Yes, your Honor.

Mr. Faulkner: Yes, your Honor.

The Court: You may proceed. Mr. Metcalf may be recalled to the stand.

(Whereupon, the witness Frank A. Metcalf resumed the [226] witness stand, and the Direct Examination by Mr. Nesbett was continued as follows:)

Mr. Nesbett: Your Honor, may I have the last question and answer read?

The Court Reporter: "Q. And, now, how were the receipts, that is, the cash receipts, from the operation of the ferry handled after the purchase in May of '51?" "A. They were directed right into the Treasurer's Office. It didn't go through my office at all." Mr. Faulkner asked for a repeat of the question, and Mr. Nesbett asked for a repeat of the answer, and then the next question commenced: "Q. Then, Mr. Metcalf, after the receipts"—there was adjournment thereafter.

(Testimony of Frank A. Metcalf.)

Q. (By Mr. Nesbett): Then, Mr. Metcalf, after monies had been received as a result of the operation of the ferry, they were given to the Territorial Treasurer, were they not? A. Yes.

Q. And into which Territorial fund did those monies go?

A. Those were earmarked for the Motor Fuel Tax Fund.

Q. Well, I mean monies from the receipts of the ferry; did they go into the Motor Fuel Tax Fund or to the General Fund?

A. They went into the General Fund.

Q. And were you or your purser, who operated the Ferry Chilkoot, able to draw on monies received as a result of [227] the operation of the ferry in order to pay the expenses of operation?

A. No, we couldn't. The only ones that could withdraw that money would be an act of the Legislature.

Q. And how long prior to the purchase of the ferry in May of 1951 had the Legislature met?

A. They met in the spring of that year.

Q. In the spring of 1951? A. Yes.

Q. And at the time the Legislature met in 1951 was it known to your office that you would be forced to purchase the Ferry Chilkoot in order to close that link in the highway system?

A. No; no, we didn't know it at that time.

Q. Then, when would the Legislature have met, after their adjournment in 1951, in the ordinary course of events? A. Two years later.

(Testimony of Frank A. Metcalf.)

Q. Would that be in 1953? A. 1953.

Q. Now, I believe you stated, did you not, that monies received from the two cents per gallon tax on gasoline went into the earmarked Motor Fuel Tax Fund; is that correct? A. Yes.

Q. And what was the purpose of that Motor Fuel Tax Fund [228] which was earmarked?

A. For building roads and harbor facilities.

Q. And then how was the Ferry Chilkoot paid for when it was purchased by the Territory in May of 1951?

A. It was paid out of that fund, the Motor Fuel Tax Fund.

Q. Out of the Motor Fuel Tax Fund?

A. Yes.

Q. And how were the operating expenses, after the purchase, met?

A. They were also met out of that same fund.

Q. But then is it your testimony that, although the earmarked Motor Fuel Tax Fund was used to pay the expenses, it was not possible for you or your purser to use any of the monies, received as receipts, for the services of the ferry?

A. No, we couldn't use them at all.

Q. And you were in the position, were you, of having to pay all the expenses of the ferry out of the earmarked Motor Fuel Tax Fund, but being unable to use any of the receipts to pay the crew and the operating expenses; is that right?

A. That is true.

Q. How long did that method of handling re-

(Testimony of Frank A. Metcalf.)

receipts and disbursements in connection with the ferry continue to exist?

A. It went all through that first year. [229]

Q. Can you state, roughly, when you ceased to use that method?

A. We ceased to use that method immediately after we had established this special fund for using the returns of the ferry for its operation.

Q. Now, Mr. Metcalf, will you explain to the Court and the jury why a different method of handling the receipts and disbursements was devised by the Territorial Board of Road Commissioners?

A. Yes. We had a meeting, and I explained the situation from my standpoint and told them where I was using funds which I didn't think related to that on account of being collected from sections of the country which received no benefit from it, and I thought that, as all other boats that came up to this country the purser was furnished with a cash account to pay for longshoremen, pay his advance freight rates, and other expenses due at that time, that I thought that we ought to be able to use the funds that we were collecting from passenger and freight receipts to operate it, to buy the oil and to pay the men when it was due.

Q. I will ask you what, if you know, the requirements were in connection with the payment, for example, of longshoremen who handled the cargo on the ferry at the ports?

A. That is a Federal law, and we had to pay

(Testimony of Frank A. Metcalf.)

them as soon as [230] their time was up and they finished their work.

Q. Then, would it create a great deal of difficulty in attempting to handle the method by vouchers through the Auditor and then payment out of the Motor Fuel Tax Fund?

A. It would be weeks sometimes before they would get their pay.

Q. Now, in connection with payment of the members of the crew, it is a fact, is it not, that payment to those people of their wages, earned while working on the ferry, were governed by Federal regulations?

A. Yes; the Marine Law.

Q. Sir?

A. The Marine Law, as I understand it.

Q. Now, to state as an example, if one of the sailors, able-bodied seamen, quit his job on the ferry, what requirements would the Federal law lay down with respect to the payment of that man's wages?

A. He had to be paid immediately upon ceasing work.

Q. Now, you mentioned advance freight rates. Would you explain that just briefly for the Court and the jury and what difficulty you experienced in connection with the meeting of that requirement?

A. Well, often shipments came up from the States for Haines on the Alaska Steamship and were probably left at Juneau. We had to pay, oftentimes we had to pay, the freight [231] that far and collect it when we got to Haines.

Q. Then, in a situation of that sort would your

(Testimony of Frank A. Metcalf.)

purser of necessity be required to pay Alaska Steamship Company for the freight before he could receive the freight, place it on the ferry and carry it to its ultimate destination where he would collect for it?      A. That happened several times.

Q. Now, did that result in considerable inconvenience and involve bookkeeping to try and run those matters through on vouchers through the various offices?

A. Yes. It held up the shipment of that freight often quite a number of days and weeks.

Q. Now, going back to the purchase of the Ferry Chilkoot, did you state that one, Mr. Sommers, owned that ferry prior to the purchase of it by the Territory?      A. Yes.

Q. Did Mr. Sommers propose to operate that ferry between Haines and Juneau and other places during the '51 season as a private enterprise?

A. He tried it; yes.

Q. Will you explain what you mean when you say "He tried it"?

A. Well, he couldn't make it pay.

Q. Was any other agency or organization or company asked to attempt to take the ferry over and operate it as a private enterprise? [232]

A. That I do not know.

Q. I will ask you, isn't it a fact that you went to Alaska Steam and asked them, "Would you operate this ferry as a private enterprise?"

The Court: Counsel, aren't we going rather far

(Testimony of Frank A. Metcalf.)

afield? Again, can we limit the issues as far as possible to what is material and essential to be shown here? I do not find that to be material in this present inquiry.

Mr. Nesbett: Very well, your Honor.

Q. (By Mr. Nesbett): Now, do you recall the date that the method of handling the receipts and disbursements of the Ferry Chilkoot was changed?

A. Immediately after the action of the Board.

Q. And do you know the date of that action?

A. June 5, I believe.

Q. Of 1952? A. '52; yes.

Q. Now, can you tell the Court and the jury briefly what occurred at that meeting of the Territorial Board of Road Commissioners on June 5, 1952?

Mr. Faulkner: If the Court please, I think the record of that would be the best evidence.

The Court: I presume that minutes were kept of the Board meetings? A. Yes, sir. [233]

The Court: I presume such minutes would be the best evidence.

Q. (By Mr. Nesbett): Mr. Metcalf, I hand you this paper and ask you if you can identify it?

A. Yes. This is the minutes of the Territorial Board of Road Commissioners on June 5, 1952, 10:00 a.m.

Q. And in which office were those minutes prepared? A. They were prepared in my office.

Q. Is the signature to those minutes your signature? A. Yes, sir.



(Testimony of Frank A. Metcalf.)

Mr. Nesbett: Your Honor, I will offer this in evidence. (Handing proposed exhibit to defendant's counsel.) Do you have any objection?

Mr. Faulkner: No.

The Court: It may be admitted.

The Clerk: That will be Plaintiffs' Exhibit No. 9.

Q. (By Mr. Nesbett): Mr. Metcalf, is this paper I just handed you, which is Plaintiffs' Exhibit No. 9 now, a true copy of the minutes of the Board as reflected from the official records in the Highway Engineer's Office?

A. It is certified to, I think.

Mr. Nesbett: I will read this, your Honor. It is very short.

The Court: Very well. [234]

Mr. Nesbett: The heading is: "Territorial Board of Road Commissioners. June 5, 1952. 10:00 a.m. Present. Governor Gruening, Chairman; Mr. Henry Roden, Member; Mr. Frank A. Metcalf, Secretary. Also present: Mr. J. Gerald Williams, Attorney General."

"The problem of financing the M/V Chilkoot was discussed. It was pointed out that the fair and equitable method would be to redeposit the receipts from the ferry back into the Motor Fuel Tax Fund in order to defray part of the operating costs. Mr. Williams stated that there was no provision so far as he knew for this but would do further research on the matter. Mr. Roden felt that as long as every cent is accounted for, the ferry could be operated in part as

(Testimony of Frank A. Metcalf.)

a private enterprise and the purser could meet some of the expenses out of the receipts rather than turning the money back into the General Fund. This recommendation was unanimously approved by the Board. The Attorney General, Mr. Williams, offered no objections.

“A discussion as to the number of cars waiting in both Haines and Juneau led to a decision that in the public interest this backlog should be taken care of before the freight that was to go to Yakutat for Wallace Westfall is delivered. Mr. Westfall was called into the meeting and advised of this decision. It was pointed out that the ferry would maintain two full crews until the backlog is caught up [235] and the freight delivered to Yakutat in order to run continuously and better serve all concerned.”

The rest of the minutes concerns only action taken by the Board in connection with the Homer Dock, and the Committee then resolved itself into another committee to handle other business. Unless Mr. Faulkner objects——

Mr. Faulkner: No.

The Court: Such references may be omitted.

Mr. Faulkner: No objection to its going in.

Mr. Nesbett: Signed “Respectfully submitted, Frank A. Metcalf, Secretary.”

Q. (By Mr. Nesbett): Then, Mr. Metcalf, will you explain to the Court and the jury how then the receipts and disbursements in connection with the operation of this ferry were handled subsequent to that meeting of the Board?

(Testimony of Frank A. Metcalf.)

A. They were placed in a special account in B. M. Behrends Bank at the disposal of our purser.

Q. And who was the purser?

A. Bobby Coughlin.

Q. And who employed Mr. Coughlin to be purser?

A. I did; that is, I recommended to the Board that he be employed because he had twenty-five or thirty years' experience in actual purser's work.

Q. How long had you known Mr. Coughlin prior to his employment? [236]

A. Oh, thirty-odd years anyway.

Q. Now, Mr. Metcalf, tell the Court and the jury then how Mr. Coughlin handled the receipts and disbursements after June 5, 1952.

A. He collected them as they came due on the boat. Often the fares were not paid until they got aboard the boat, and often the freight was paid after it got aboard the boat, as far as the cars were concerned and the trucks.

Q. And to whom was the passenger fare and the freight cost paid?      A. Paid to the purser.

Q. Mr. Coughlin?      A. Mr. Coughlin.

Q. And what would Mr. Coughlin then do, after he had made a round trip to Haines, with the money he had received?

A. He deposited it directly into the bank.

Q. And did Mr. Coughlin at the end of each trip make any report or check in with anyone connected with the Board, the Territorial Board of Road Commissioners?

(Testimony of Frank A. Metcalf.)

A. It was his custom; yes.

Q. His custom to do what?

A. To report and to make his weekly report to the office.

Q. And where did he make the reports?

A. To my office. [237]

Q. And, usually, whom did he work with in your office in that connection?

A. With my administrative assistant.

Q. And is it your testimony that at the end of each round trip Mr. Coughlin would come in and make a complete report with your secretary as to monies taken and monies expended during that voyage?

A. No, not after each voyage. Sometimes it was the end of the month before he would come in with his reports.

Q. And after he had checked in with your office did he—rather, I will ask this—strike that question. Did you attempt to acquire a Territorial bookkeeper to handle the books with respect to this new method of disbursing receipts?

A. Yes. I contacted the Auditor.

Q. Who was the Auditor?           A. Neil Moore.

Q. And what did you request of Mr. Moore?

A. I asked him to fix up a set of books that would comply completely with our operations, and he said he had no funds to do that with, and he refused my request.